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CASE AND COMMENT

CLAIM BY CROWN FOR LOSS OF SERVICES—MASTER AND SERVANT— POLICE CONSTABLE

THE case of *Att.-Gen. for New South Wales v. Perpetual Trustee Co. (Ltd.) & Others* [1955] 2 W.L.R. 707, in the Privy Council, raises a new and most important aspect of the position in law of a police constable. His status has most frequently been considered when it has been sought to make some superior person or body responsible for his wrongful acts on the principle of *respondeat superior*. But the present case involves a different claim, namely, that his employer can recover against a defendant who by his negligence has injured the constable and so deprived the employer of his services—a claim founded on the action *per quod servitium amisit*.

The facts were that a police constable, a member of the New South Wales police force, was injured while travelling as a passenger in a tram-car when that vehicle was in collision with a motor-car which was being negligently driven by a person for whom the respondents were responsible. The constable was thereby prevented from carrying out his duties and was eventually discharged from the force. While so disabled, the Crown (as employer in New South Wales) paid him his salary and, after his discharge, the pension to which he was entitled by statute; though, but for the disablement, he would not have received a pension for many years. The Crown, in an action *per quod servitium amisit*, claimed to recover from the respondents the payments already made and to be reimbursed the cost of pension payments to be made in the future. In the Supreme Court of New South Wales the Crown's claim failed, Street C.J. holding that the case was covered by the decision of the High Court of Australia in *Commonwealth v.*

Quince (1944) 68 C.L.R. 227, where it was held that such an action would not lie at the suit of the Crown in respect of the loss of the services of a member of the armed forces as a result of injuries he sustained through the negligent driving of the defendant. On appeal to the High Court of Australia, this decision was, by a majority, affirmed; the present appeal was brought to the Privy Council by special leave.

Now there is no doubt that from very early days the action *per quod servitium amisit* was available to a master against a wrongdoer for the loss of services of his servant (see Salmond on *Torts* (11th ed.) p. 406) and the crucial question to be answered is whether a police constable stands towards his employer in a servant-master relationship, or a sufficiently analogous relationship, for this action to lie on the present facts. The Privy Council therefore gave preliminary consideration to those cases in which the status of a constable had been judicially considered bearing in mind the fact that in most of them his status was examined in relation to the doctrine of *respondeat superior*. For, while recognising that the areas of the applicability of that doctrine and of the action *per quod servitium amisit* are not necessarily co-terminous, those cases do contain valuable and apposite statements as to the status of a constable, and a brief reference to the principles to be deduced from these cases is a necessary preliminary.

It is now clear that in England police constables are not servants or officers of the Crown within the meaning of section 2 (6) of the Crown Proceedings Act, 1947, so as to make the Crown liable for their torts, for they are neither appointed nor paid by the Crown. Furthermore, it has been held (*Fisher v. Oldham Corporation* [1930] 2 K.B. 364) that *when effecting an arrest*, they are not acting as servants of the local authority so as to make that body responsible for a wrongful arrest; for in so doing a constable is exercising an original authority and not a delegated one. As Professor Street puts it (*Governmental Liability*, p. 33), "the essence of vicarious liability is control by the master, who cannot exercise the control where the officer is carrying out a legal duty." So in Australia in *Enever v. R.* (1906) 3 C.L.R. 969, it was held that the Government of Tasmania was not liable for the wrongful arrest of the plaintiff by a constable, Barton J. saying (at p. 983): "the person must be not only the servant of the superior, but must be under the control of the superior before the latter can be held liable." The same distinction has been taken by the courts in South Africa. In *British South Africa Co. v.*

Crickmore [1921] A.D. 107, the employer was held not liable for a wrongful arrest by a constable because there was no master-servant relationship in respect of the duty which the law required the constable to perform. On the other hand, in *Union Government v. Thorne* [1930] A.D. 47, the Crown was held liable when a police constable, carrying out a task assigned to him by his employer (not being a duty cast upon him by the law), negligently injured the plaintiff.

The conclusion reached, therefore, is that there is no true master and servant relationship between a police constable and his employer. In *Fisher's* case *McCardie J.* (at p. 731) thought he could best be described as "a servant of the State, a ministerial officer of the central power." The Judicial Committee, accepting this, amplify it by saying that he is to be regarded as in some sense a servant of the Crown because the preservation of order and the prevention of crime are the functions of the Crown enforced by the police. "A constable then may be said in a certain context, and sometimes with the appendage 'or minister,' to be 'a servant of the Crown'" (p. 714). But "if ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the State" (p. 714). Since the service of a constable is so "different in nature," or "on a different plane" from the domestic relation of the true master and servant, this fundamental difference makes it necessary to approach cautiously the question whether the action *per quod servitium amisit* available for the latter relationship should also be available for the other.

The Committee therefore traced in some detail the origin and subsequent development of this action, observing that, in *Holds-worth's* words, it "rested at bottom on the idea that the master had a quasi-proprietary interest in his servant's services; and that idea is connected with ideas as to the status of a servant, which originated in the rules of law applicable to villein status." In order to limit the field of inquiry, the Privy Council considered it unnecessary to deal in detail with that aspect of the development of this action by which a master was protected against persons who enticed from him, or harboured, or maliciously procured a breach of contract with, his servants. What was relevant was to consider instances of the action lying in respect of harm done to the servant (as distinct from enticing or harbouring him) whereby the master lost his services, and these appeared to be remarkably rare. Indeed, the facts of the present case allowed of an even further narrowing down to the question of when, and on what

considerations, this form of action was first used for the loss of services of persons who were not true "servants" but whose service, like that of a police constable, lay in the public field. It appears that it was not until 1920, in *Bradford Corporation v. Webster* [1920] 2 K.B. 135, that such an action was brought for harm done to such a "servant" causing loss of services to the employer. In that case the plaintiff corporation recovered damages for the loss of the services of a police constable in their service who had been injured by the negligence of the defendant. But the Committee observe that the authority of this decision is greatly reduced by the fact that the question whether the action lay or not was allowed to go by default and that the only question argued was the proper measure of damages, so that "it does not appear to their Lordships that *Webster's* case can be relied on." The same strictures were applied to the later case of *Att.-Gen. v. Valle-Jones* [1935] 2 K.B. 209. There the Crown recovered damages for the loss of the services of two aircraftsmen in the Royal Air Force who were injured by the negligence of the defendant. But here again only the question of the quantum of damages was argued, counsel for the defendant opening his argument with an admission that the action was available to the Crown as an employer.

The conclusion of the Judicial Committee is, therefore, that their review of the relevant authorities shows that, where this action has been extended to cases of persons in the public service and who are not servants in the ordinary meaning of the law of master and servant, the extension has been made without argument or deliberation and those cases must be regarded as unreliable. The Committee take the view that the master and servant relation, on which the action *per quod servitium amisit* rests, is wholly different from the relation of the Crown to a member of the armed forces, and the case of a constable is not, in principle, distinguishable from that of the soldier. They say (p. 722) that "it would not be in accord with modern notions, or with the realities of human relationships today, to extend the action to the loss of service of one who, if he can be regarded as a servant at all, is the holder of an office which has for centuries been regarded as a public office."

This decision gives considerable support to the doubts, which some modern textbook writers have expressed, as to the propriety of extending the scope of the master's action in such cases. The editor of *Salmond on Torts* (11th ed., p. 406) criticises the extension of the principle to cases where the servant is negligently,

as distinct from intentionally, harmed, and considers the doctrine "anomalous in modern industrial conditions." The corollary to such an action is certainly not applicable, for as Lord Goddard observed in *Best v. Samuel Fox & Co.* [1952] A.C. 716 at 731, "a servant whose master is killed . . . may lose his employment . . . but no one would suggest that he thereby acquires a right of action against the wrongdoer." The present editor of Pollock on *Torts* (15th ed., p. 54) considered that the decision in *Att.-Gen. v. Valle-Jones* " (based solely on two seduction cases) " carried the law to an unfortunate position. As he pertinently asks, "Can a University recover damages if a professor is hurt in a motor-car accident? "

T. C. THOMAS.

CROWN PROCEEDINGS—EXTENT OF PROTECTION GIVEN BY CROWN
PROCEEDINGS ACT, 1947, TO INDIVIDUAL MINISTER

THE relationship between Parliament and the High Court was the subject of an important decision at the end of last year when in *Harper v. Home Secretary* [1955] Ch. 238, the Court of Appeal discharged an interlocutory injunction which had been granted *ex parte* in the Chancery Division against the Home Secretary to restrain the presentation by him to Her Majesty in Council of a draft Order; the Order had been approved by resolutions of both Houses of Parliament, in accordance with section 3 of the House of Commons (Redistribution of Seats) Act, 1949. The action was for a declaration that the Report of the Boundary Commission for England did not comply with the statutory rules in the Schedule to the Act; that it was therefore not a report within the meaning of the Act and that the Home Secretary was not bound by section 3 (4) which provides that, if a draft Order is approved by resolution of each House, "the Secretary of State *shall* submit it to Her Majesty in Council." The Court of Appeal took the view that the Report was not a departure from the rules. That was sufficient to dispose of the case. But the court, which was doubtless aware of the criticisms in the Lobbies of the House of Commons which the grant of the injunction had evoked, went on to say (Evershed M.R. at p. 251) that on a reading of the rules for the Boundary Commission and of the whole Act, it was exclusively for Parliament and not for the courts to determine any matter which was not within the discretion of the Commission. "If it were competent for the courts to pass judgments of that kind on the reports, I am at

a loss to see where the process would end and what the function of Parliament would then turn out to be."

The implications of this attitude on the part of the courts to Parliament is the subject of a long note, "Boundaries between Parliament and the Courts," by Mr. S. A. de Smith, in 18 M.L.R. pp. 281-6, and no more need be said here. But one aspect of the case has had a somewhat surprising sequel in relation to a draft potato marketing scheme; *Merricks v. Heathcoat-Amory and the Minister of Agriculture, Fisheries & Food* [1955] 3 W.L.R. 56. In that case it was held in the Chancery Division that an injunction will not lie against a Minister carrying out or proposing to carry out statutory functions. It was sought unsuccessfully to obtain the withdrawal by the Minister of a draft marketing scheme which he had laid before both Houses of Parliament and which was awaiting approval by affirmative resolution, on the ground that the scheme was *ultra vires* the Minister under the Act. Upjohn J. declined to decide the case on the issue of *vires*, but rejected the application on a preliminary point based on the Crown Proceedings Act, 1947. In the *Harper* case the Master of the Rolls concluded his judgment by referring to the capacity in which the defendant had been sued (at p. 254). Had the court found that the report of the Boundary Commission was a nullity he was not satisfied that the Home Secretary ought not to have been sued in his personal capacity as for an ordinary wrong, though in that case he was not clear what breach of duty to the plaintiffs had been committed. "On the other hand if he does sue him and rightly sues him in his capacity as Secretary of State, then I am not satisfied . . . that the case is one which, having regard to the terms of the Crown Proceedings Act, 1947, will lie. And I am not satisfied, having regard to section 21 of that Act, that on this alternative the plaintiff could in any event obtain an injunction." In *Merricks'* case the plaintiff conceded that he could not succeed against the Minister, if he was acting as representative of the Crown. There were two reasons for this. Under section 17 of the Crown Proceedings Act the proper defendant is the Ministry (not the Minister). Even if the Ministry had been made defendant, section 21 of the Act excluded the grant of the injunction asked for (but not necessarily a declaratory order). So the plaintiff argued that the Minister had two other capacities, in both of which he was being sued, either as a person designated by statute to carry out certain functions or alternatively in a purely personal capacity. After citing the passage quoted above from *Harper's* case the judge found that the Minister

was acting in his capacity as a representative or officer of the Crown in carrying out his relevant function under section 1 of the Agricultural Marketing Act, 1931. He went on to doubt whether any person could in the circumstances act in an official capacity, but not representing the Crown.

Neither in *Harper's* case nor *Merricks'* case could it be alleged that the plaintiff had suffered a tortious injury and therefore in neither case could the Crown have been sued under section 2 of the Crown Proceedings Act (apart from the procedural bar against an injunction lying which is imposed by section 21 in favour both of the Crown and also of its officers, if the effect of granting the injunction could be to give relief against the Crown which could not have been obtained in proceedings against the Crown). But the Crown Proceedings Act is an Act to enable proceedings to be brought against the Crown. It is not (apart from the stated exceptions in section 9 and section 10) an Act to protect Crown servants from liability. If therefore a Minister commits an *ultra vires* act in the course of his duties, it is difficult to see why in an action for a declaration an order should not be made against him, or, in the appropriate case, why certiorari or prohibition orders should not lie, just as he can be held personally liable for his tortious acts in the unlikely event of his committing a tort in the course of his official duties.

The desire not to provoke a conflict between the courts and Parliament as to their respective spheres of activity—which was a relevant issue in both these cases—should not be allowed to obscure the salutary rule that for a breach of law, whether a common law tort or an excess of statutory power, a servant of the Crown remains personally liable.

E. C. S. WADE.

LOCAL AUTHORITIES—VALIDITY OF EXERCISE OF DISCRETIONARY
POWERS

Two interesting cases dealing with the exercise of discretionary powers by local authorities have been decided recently, the first being *Prescott v. Birmingham Corporation* [1955] Ch. 210, C.A., and the second being *Smith and Others v. Cardiff Corporation* [1955] Ch. 159.

The short facts of the first case were that Birmingham Corporation were authorised by statute to operate a transport undertaking and to charge, subject to certain conditions, such fares to passengers travelling on their vehicles as they thought fit—clearly a discretionary power. After giving careful consideration to the matter

and on learning that some twenty to thirty other local authorities had been operating on their transport undertakings free or concessionary fare schemes for old people, in some cases for up to thirty years, the Corporation resolved to provide free travelling facilities at non-peak travelling hours on their 'buses for certain classes of old people, although there was no express statutory provision enabling them to introduce such a scheme.

A ratepayer of Birmingham, Mr. Gregory Prescott, with financial assistance from other ratepayers, challenged the validity of the scheme: the case came before Vaisey J. in the Chancery Division, who held that the free travel scheme was *ultra vires* the Corporation. The Corporation then appealed to the Court of Appeal who dismissed their appeal.

The facts of the second case, *Smith v. Cardiff Corporation* (which, after a preliminary procedural skirmish, reported at [1954] 1 Q.B. 210, came up for hearing in the Chancery Division before Danckwerts J.) were that Cardiff Corporation, anticipating very substantial deficits in their housing accounts, introduced a differential rent scheme in respect of houses provided by them under the Housing Act, 1936. By virtue of section 83 of the Housing Act, 1936, the Corporation were entitled to make such reasonable charges for the tenancies of the houses in question as they might determine—again clearly a discretionary power. Section 85 of the same Act required the authority from time to time to review rents and to make such changes in their rents as circumstances might require. This section also empowered the Corporation to grant to any tenants such rebates from rents as the Corporation might think fit. Under Cardiff's differential rent scheme variations were made in the amount of rent payable for similar houses depending on the respective tenants' incomes. For example, a tenant earning more than £500 per annum or whose wife or adult children were in paid employment, paid up to 12s. 6d. per week additional rent. There were provisions in the scheme for changes in rent to be made where income fluctuated. Four Corporation tenants claimed that the scheme was *ultra vires* the local authority or alternatively that the charges were unreasonable and that the scheme was, therefore, invalid. In this case, unlike *Prescott v. Birmingham Corporation*, the local authority were successful, Danckwerts J. holding that the scheme was not *ultra vires* the local authority.

At first sight, the facts of the two cases appear to be rather similar in that in both cases local authorities, in providing different services, with a discretionary power to make charges in each,

were apparently trying to take note, in fixing those charges, of the means of the persons using the services provided by them. Why then the differing decisions? The secret seems to lie primarily in the different type of local authority service provided in each case, one being essentially a commercial venture and the other being in the nature of a social or welfare service. Indeed, an examination of the judgments in the two cases shows that the principles on which the judgments are based are somewhat different: further, it is suggested that the judgment of the Court of Appeal in the *Prescott* case, delivered by Jenkins L.J., deserves careful consideration because it involves certain principles which appear novel when applied to local authority services.

Although the Lord Justice in his judgment agreed with Birmingham Corporation's contention that they had a discretionary power to charge fares on their undertaking and that, for example, if they charged one passenger 1d. and another 2d. for the same journey, the passenger charged 2d. could not object, nevertheless, he held that the Corporation's transport undertaking should be run as a business venture and that fares should be fixed in accordance with ordinary business principles: and that if this were not done, a ratepayer could challenge the validity of the fares charged as had been done by the plaintiff. The whole tenor of his reasoning is perhaps well illustrated by the following two extracts from his judgment:

"Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter. Thus local authorities running an omnibus undertaking at the risk of their ratepayers, in the sense that any deficiencies must be met by an addition to the rates, are not, in our view, entitled, merely on the strength of a general power, to charge different fares to different passengers or classes of passengers, to make a gift to a particular class of persons of rights of free travel on their vehicles simply because the local authority concerned are of opinion that the favoured class of persons ought, on benevolent or philanthropic grounds, to be accorded that benefit. In other words they are not, in our view, entitled to use their discriminatory power as proprietors of the transport undertaking in order to confer out of rates a special benefit on some particular class of inhabitants whom they, as the local authority for the town or district in question, may think deserving of such assistance. In the absence of clear statutory authority

for such a proceeding (which to our mind a mere general power to charge differential fares certainly is not), we would for our part regard it as illegal on the ground that, to put the matter bluntly, it would amount simply to the making of a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers . . ."

"We are not persuaded by the argument of counsel for the defendants to the effect that the relevant legislation would allow the defendants to charge no fares at all to anyone and to finance their transport undertaking entirely out of the rates. We think it is clearly implicit in the legislation that while it was left to the defendants to decide what fares should be charged within any prescribed statutory maxima for the time being in force, the undertaking was to be run as a business venture, or, in other words, that fares fixed by the defendants at their discretion, in accordance with ordinary business principles, were to be charged. That is not to say that in operating their transport undertaking the defendants should be guided by considerations of profit to the exclusion of all other considerations. They should, no doubt, aim at providing an efficient service of omnibuses at reasonable cost, and it may be that this objective is impossible of attainment without some degree of loss. But it by no means follows that they should go out of their way to make losses by giving away rights of free travel."

It may be added that, at the time of the Court of Appeal's decision in the *Prescott* case, the accumulated deficit on the Birmingham transport undertaking was, according to Jenkins L.J.'s understanding of the position, some £700,000! Nevertheless, it is interesting to note that his Lordship quoted but one small dictum (and that clearly *obiter* to the case from which it was taken) in support of the main part of his judgment; and, in effect, it is submitted that he was propounding quite a new principle in respect of certain local authority services—his *ratio decidendi* would presumably apply equally to such services as water, markets, civic restaurants and the like—namely that they must be operated according to reasonable business principles and that discretionary powers in connection with those services must be exercised with a distinct eye to the profit motive.

The *ratio decidendi* of the *Cardiff Corporation* case is rather different from this. There is no suggestion in Danckwerts J.'s judgment that a local authority must run their housing service on

strict business lines or indeed must exercise their power to charge rents on that basis. At page 118 Danckwerts J. quotes from the judgment of Goddard J. (as he then was) in *Leeds Corporation v. Jenkinson* [1935] 1 K.B. 168 as showing, *inter alia*, the purpose of this part of the Housing Code:

“The Master of the Rolls has pointed out what is the object of this legislation. It is to provide houses for the classes of the community who cannot afford to pay economic rents; but the object of the Act is not to provide subsidised houses for people who can afford to pay economic rents. It seems to me that all the corporation are doing by this plan is to see that persons who can afford to pay economic rents for these houses shall pay them, which will enable them, of course, to make greater concessions in the rents to persons who cannot afford to pay economic rents.”

Thus Danckwerts J. appears to recognise that it is a perfectly proper thing for a local authority to take into account their tenants' means and to charge different rents to different tenants for the same house. Presumably, therefore, if a tenant could not afford to pay rent, the local authority could exercise their discretion to charge rents in a philanthropic manner and provide him with a house at a nominal rent.

But, in truth, there are also other differences between the facts of the two cases. Birmingham Corporation's free travel scheme was obviously going to cause a considerable loss on the city's transport undertaking, whereas the purpose of the Cardiff Corporation scheme was to prevent a loss in their housing accounts, and it might possibly be argued that the way in which Cardiff tackled their problem was a wise one even from a commercial point of view.

However, it is clear that the decision in the *Prescott* case will act as yet another fetter on the exercise of discretionary powers and will require local authorities, when exercising discretionary powers in relation to quasi commercial services provided by them, to have regard to business rather than philanthropic principles, unless they have obtained specific statutory powers to enable them to carry out their philanthropic schemes. In this connection, it is interesting to note that Birmingham's and certain other local authorities' free travel schemes were subsequently largely validated by the Public Service Vehicles (Travel Concessions) Act, 1955, an Act which was introduced as a Bill by a Private Member and which was rushed through both Houses shortly before the dissolution of the last Parliament.

(The above note was kindly supplied by a learned contributor who does not wish to append his name.)

EDUCATION ACT, 1944—STATUTORY DUTY WITH REGARD TO THE
PARENTS' WISHES

THE case of *Watt v. Kesteven County Council* [1955] 1 K.B. 408 (Ormerod J., affirmed by Denning, Parker and Birkett L.JJ. in the Court of Appeal), decided a point of construction under the Education Act, 1944, which is of conspicuous practical importance.

The relevant facts may be summarised as follows: Kesteven C.C. used Stamford School, in the absence of any secondary grammar school maintained by them, to secure places for pupils entitled to secondary education in an independent school, and paid the tuition fees. The plaintiff was offered the same facility for his sons, but, as he was desirous for them to be educated in a Roman Catholic school, he refused and sent them—as boarders—to a school in Northamptonshire, Blackfriars School. He contended that, since both schools were recognised as efficient and since tuition fees were lower in the latter than in the former, the education authority, being obliged to provide his sons with free secondary education, could not refuse to pay the fees charged by Blackfriars School without being in breach of the duty laid down by section 76 of the Education Act, 1944 (henceforth referred to as the Act):

In the exercise and performance of all powers and duties conferred and imposed on them by this Act the Minister and local education authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.

Kesteven C. C. denied that they had the duty to pay the tuition fees charged by Blackfriars School, but decided to give Mr. Watt a global contribution to tuition and boarding fees under section 81 of the Act, a provision which, in connection with the Regulations for Scholarships and other Benefits, 1945, made thereunder, enables local education authorities to pay, *inter alia*, when necessary to avoid financial hardship to the parents, the whole or part of the fees and expenses of pupils attending schools at which fees are payable. Not being satisfied with that offer, Mr. Watt brought an action to enforce his alleged rights. Both courts found for the defendants.

Though this is not quite clear—as it will appear—both decisions seem to rely on the view that, on its true construction, section 76 of the Act does not create a duty which can be enforced by an individual parent as soon as its two conditions (efficiency of

education and avoidance of unreasonable public expenditure) are complied with.

The Court of Appeal went into detail in analysing the duties imposed on local education authorities. Parker L.J., in particular, referred to section 8 of the Act (duty to provide sufficient secondary schools for the area), to section 61 (provision of free education at maintained schools) and to section 81 cited above. He considered that these provisions did not support the plaintiff's contention "that the obligation to secure that sufficient schools are available involves an obligation to pay full tuition fees at an independent school where sufficient maintained schools are not available" (p. 246); that it was only after Kesteven C. C. had taken their decision that such a duty had been created (see s. 6 (2) (a) (ii) of the Education (Miscellaneous Provisions) Act, 1953); that "while, therefore, the authority was in this case prepared to pay full tuition fees at Stamford School, there was not until July 14, 1953, any obligation or authority to do so" (pp. 427-8).

Parker L.J., it would seem, intended to decide the case on that conclusion, which does not appear to be fully in agreement with the opinion expressed by the Minister of Education in his Circular No. 268 (August 17, 1953) and which might perhaps have required a more elaborate analysis of the Act, of its scope and of its purposes (the chief of which was apparently to secure free secondary education for all). Nevertheless he thought it better to consider the next point too, on which the Lords Justices, as well as Ormerod J., were very firm in their view that section 76 does not imply that, in performing their duty to pay full tuition fees at an independent school when they are unable to provide secondary education in another way, the local authority is under an obligation to pay tuition fees at any school of the parents' choice, even though the two conditions of section 76 are complied with. Parker L.J. made it quite clear that the authority are entitled to take into account other matters than these two conditions and the parents' wishes (p. 429). Denning L.J. went even further and said that the duty of the local authority is nothing more than to pay the fees at the particular independent school of their own choice for which they have made arrangements with the Minister, so that "having done this, there was no occasion for section 76 to come into operation at all" (p. 424). However, he does not seem to have attached very much weight to this argument, which it is difficult to reconcile with section 76 at all, and he undertook, as well as Parker L.J., to determine what section 76 is really requiring from education authorities: "It only lays down

a general principle to which the county council must have regard . . .” (Denning L.J., p. 424), “. . . weighing it in the balance together with and against other considerations” (Parker L.J., p. 429). They both agreed that, on the facts proved at the trial, there was no evidence that Kesteven C. C. did not have regard to the general principle in this sense.

The present note is not the place for analysing the other parts—clearly *obiter*—of the decisions, which are concerned with the problem of enforcement of statutory duties. On their main reasons, the judgments delivered in the Court of Appeal, though they do not meet Mr. Watt’s wishes, may be considered as providing a slightly better safeguard than the decision of Ormerod J., who explicitly thought it unnecessary owing to its vague wording to determine the scope of the duty laid down by section 76 (p. 413); on the contrary, Denning and Parker L.JJ. made it clear that if it should appear, on the facts of some later case, that the authority did not have regard to the general principle of section 76—as defined by them—the parent would be entitled to succeed, so far as the proper remedy is available. That construction appears to be the minimum required by section 76, and it might perhaps be relevant, in certain cases (*e.g.*, where several suitable schools are under the control of the authority), for the parent to rely on the safeguards provided by section 37 (2) of the Act, especially on his right of selecting a school before a school attendance order is issued by the authority; for it may be remarked that the authority are empowered to refuse to name the school so selected by the parent and to refer the case to the Minister only if they are of the opinion that the two conditions of section 76 (and not other considerations) make it impossible to name the said school. It is obvious that, lest an unjustifiable advantage is given to these parents whose obstinacy would go so far as to refuse to send their children to another school than the one they have selected, section 76 must be construed in connection with section 37.

C.-A. JUNOD.

NATIONALITY—EFFECT OF PREAMBLE ON INTERPRETATION OF STATUTE

4 & 5 Anne, c. 16,¹ repealed by the British Nationality Act, 1948, provided that the Electress Sophia “and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be . . . deemed, taken and esteemed natural

¹ Statutes of the Realm. In Ruffhead’s edition and in the Statutes at Large, the Act is printed as c. 4.

born subjects of this kingdom, as if the said Princess, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, had been born within this realm of England, any law, statute, matter, or thing whatsoever to the contrary notwithstanding." In *Prince Ernest of Hanover v. Att.-Gen.* [1955] Ch. 440, Vaisey J. indicated that these words were by themselves plain and unambiguous and would therefore involve that the plaintiff, who was born in Hanover in 1914 and was lineally descended from the Electress Sophia, was born a British subject and in consequence became a citizen of the United Kingdom and Colonies by virtue of the British Nationality Act. But the learned judge held that, since the literal application of the enacting words quoted would involve that some 400 persons besides the plaintiff, including members of almost all the royal houses of Europe, would be within them, their generality must be restrained. In order to restrict them he relied on the preamble to the statute, despite the rule enunciated in *Powell v. Kempton Park Racecourse Co.* [1899] A.C. 143 that a preamble cannot be used to control a statute expressed in clear terms. He adopted in this connection the proposition of Parker C.B. in *Ryall v. Rowles* (1750) 1 Atk. 164, at 174, that "if the not restraining the generality of an enacting clause will be attended with an inconvenience, the preamble shall restrain it." Undoubtedly some such exception as this exists: Craies on *Statute Law*, 5th ed., p. 189; Maxwell on *The Construction of Statutes*, 10th ed. p. 44. But it is manifestly of very limited application and it would seem to demand that the preamble should be no less clear than the enacting words.

In this case the preamble was not clear. It recited that "to the end the said Princess Sophia . . . and the issue of her body and all persons lineally descending from her may be encouraged to become acquainted with the laws and constitution of this realm, it is just and . . . reasonable that they in Her Majesty's [*i.e.*, Queen Anne's] lifetime . . . should be naturalised." Vaisey J. refused to interpret this, as one might be tempted to do, to mean that the statute applied only to persons born before the death of Queen Anne, though this would have followed if the words "in Her Majesty's lifetime" had been placed immediately after the words "descending from her." But he thought it permissible upon a consideration of the preamble to suppose "that the main object of the Act was to make sure that whichever of the foreign-born and alien-tongued persons who would be proclaimed, crowned and enthroned as the Queen's immediate or next proximate successors, should have already become subjects of England. . . .

To suppose that Parliament thought that every descendant, however remote in time or distant in kinship of the Electress, ought to study English law is really rather absurd, however salutary the topic would have been to the immediate successors of Queen Anne" (at p. 449, italics supplied). He confessed, however, that the "unqualified and plain" character of the enacting clause had caused him some considerable hesitation and he admitted that there are examples of grants of citizenship to a man and his heirs, referring in especial to the grant to Lafayette to which Professor Goodhart had directed his attention. But he concluded that "the examples of dual nationality, which undoubtedly do exist, give rise to so many anomalies and sources of confusion that their number ought not to be extended further than is necessary" (p. 452), and noted that no Statute Law Revision Act had repealed the statute on which the plaintiff relied and that no steps were taken during either World War to deprive any possible beneficiary thereunder who might be adhering to the enemy of his British nationality. In fine, it would be wrong and unnecessary to say that the Act had not become obsolete: its purpose had been fulfilled and its operation spent long ago.

One difficulty with this argument is to know when the Act ceased to operate. The learned judge said no more than that "it became at an early date entirely superfluous, when the number of those in the succession who were British subjects [*scil.* born in Britain] had reached such numbers that the succession of the alien-born descendant had become only a remote possibility" (p. 448). The possibility was not of course remote during the first half of the eighteenth century, for both George I and George II were alien born. And it is significant that upon the accession of Victoria the plaintiff's great-great and great-grandfather, the first and second Dukes of Cumberland (of that creation) stood first and second in the line of succession—from which positions they were not displaced until the birth of the later King Edward VII in 1841. Admittedly these persons, as well as the third Duke, who was born in 1845, had an independent title to be British subjects in virtue of the then general law of nationality. For though the second Duke was born in Berlin and his son in Hanover, the first Duke, the fifth son of George III, was born in England (*cf. Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1). Today no member of the House of Cumberland (or Hanover) is within the first fifty persons entitled in succession to the Crown, but the tale of the foreign-born still begins with the sixteenth such person. Even upon the supposition that the intent of the Act was to ensure

that persons succeeding to the Crown "should do so in possession of British nationality" the argument does not follow—unless indeed this intent related only to "the then existing persons" as Vaisey J. seems at one point to suggest (p. 448) despite his refusal to read the words of the preamble as transposed. It may be hazarded, moreover, that the parliamentary motive was not precisely the advisability and convenience of ensuring that Queen Anne's "immediate or next proximate successors" should be subjects. It was rather the perennial doubt as to whether an alien could succeed—the doubt which accounts for the well-known provision in the statute *De natis ultra mare* of 1351 that "the law of the Crown of England is, and always hath been such, that the children of the Kings of England, in whatsoever parts they be born . . . be able and ought to bear the inheritance after the death of their ancestors," for the erroneous legend that Margaret of England, wife to James IV, was scrupulous to journey south of the border for her confinements (*Lincoln's Inn*, Hale MS. 75), and for Elizabeth I's denial of the English lands of his Lennox grandparents to James VI, for fear of prejudging his greater claim (Stafford, *James VI of Scotland and the Throne of England* (1940), p. 251). Such doubts were unjustifiable after the parliamentary settlement of the succession—perhaps even after their ignoring in practice upon the death of Elizabeth I. And, as Vaisey J. pointed out, the Prince of Hanover still stands in the line of succession and is still a "prince of Great Britain and Ireland" despite either alienage or the suspension of his British dukedom under the Titles Deprivation Act, 1917. But many of the dubieties of the medieval law of nationality survived the eighteenth-century statutes and it was not indeed until 1882—and thus only shortly before the birth of the father of the plaintiff in this case, the first of his line not to be a British subject (1887)—that it was decided that British nationality descended no further than the second foreign-born generation: *De Geer v. Stone* (1882) 22 Ch.D. 243.

But, under the rule of construction contended for, even an unambiguous and correctly construed preamble may be invoked to limit plain enacting words only where following the latter "will be attended with an inconvenience." What inconvenience is involved in attributing British nationality to even as many as 400 descendants of the Electress Sophia? Vaisey J. referred to dual nationality—a condition the British Nationality Act, 1948, may be fairly said positively to encourage. He referred also to divided allegiance in time of war—a dilemma faced already by many. What other inconvenience could there be? It might be

suggested that the result of the strict and literal construction of the Act of Anne would be to bring the House of Hanover, and also persons much nearer to the throne, within the scope of the Royal Marriages Act, 1772, and indeed to bastardise half the princely houses of Europe as issue of marriages to which no consent has been given under the latter Act. But it is apprehended that it has not been suggested hitherto that that Act is confined to British subjects; its very exception of the issue of princesses marrying into foreign families implies the contrary: Dicey, *Conflict of Laws*, 6th ed. (1949), p. 778, n. 47. Indeed, it might be thought to be a far more serious objection to the Prince of Hanover's claim to be within the Act of Anne that his ancestors never secured the royal consent to their marriages than that the Act of Anne had spent its force before his birth—unless advantage may be taken of Mr. Farran's ingenious argument, which Dr. Cheshire appears to accept, that cross-marriages have produced the situation that any person who is within the general rule of the Act of 1772 is also within the exception: (1951) 14 M.L.R. 53, esp. 63; Cheshire, *Private International Law*, 4th ed. (1952), p. 308, n. 5.

Since the foregoing note was written an appeal has been heard but not decided.

CLIVE PARRY.

CRIMINAL LAW—LARCENY—EFFECT OF SECTION 2 OF THE LARCENY ACT, 1916—ITS RELATION TO OTHER STATUTORY PROVISIONS—EFFECT OF SECTION 18 OF THE ARMY ACT, 1881

OUTSIDE the small circle concerned with military law, for whom *R. v. Bryant* [1955] 2 All E.R. 406 settles a practical point which has for long been the subject of much controversy at the highest level, it is in danger of being overlooked. The same result could have been reached by a different route; and some, even among those who agree with the result, may possibly think that the route by which it was reached provides more difficulties than it solves. But, for good or ill, the decision has considerable significance over the whole field of offences covered by the Larceny Act, 1916. Indeed, the point raised was thought sufficiently important to call for consideration by more than the usual three judges, though at the very last moment it was realised that the four judges appointed to hear the appeal would either have to be increased to five or (as in fact happened) reduced to three in order to comply with the requirements of section 2 (1) (a) of the Courts-Martial (Appeals) Act, 1951.

The appellant, who was an army sergeant, was convicted by a court-martial in the Canal Zone of stealing £E2 from the President of the Regimental Institute. He did not dispute the theft, but complained that he should have been charged with stealing under section 18 (4) of the Army Act and not (as in fact was the case) under section 41 of the Army Act with committing a civil offence, namely, stealing, contrary to section 2 of the Larceny Act, 1916, which enacts that "stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with imprisonment for any term not exceeding five years." The appellant's argument was that, since he undoubtedly could have been convicted under section 18 (4) of the Army Act and sentenced to two years' imprisonment, he was, therefore, outside the scope of section 2 of the Larceny Act and that his conviction thereunder was in consequence bad.

The Courts-Martial Appeal Court, however, rejected this contention and held expressly that section 2 of the Larceny Act, 1916, does not create an offence; it merely imposes a penalty for the common law offence of simple larceny. The court, incidentally, further held that, by virtue of section 18 (4) of the Army Act, the appellant could not have been liable to more than two years' imprisonment; but, since he had in fact merely been reduced to the ranks, this part of the decision appears to be *obiter*.

One result of the decision is that the time-honoured precedent in Archbold (see p. 937 of the 33rd edition) for an indictment for simple larceny can no longer stand, for there the charge is laid "contrary to section 2."

What, however, is the position with regard to other sections, such as section 12 (larceny of postal packets, etc.), or section 13 (larceny from a dwelling-house), or section 14 (larceny from the person)? Are these separate statutory offences? Or are they each a stealing at common law with a special penalty provided by the section?

Furthermore, does the decision by implication lead to the conclusion that an act of conversion can render the perpetrator guilty both of larceny as a bailee and also of fraudulent conversion contrary to section 20 (1) (iv)? The wording of this section is certainly wide enough to cover the misappropriation of a specific chattel; and it is only by reason of the view that the sections of the Larceny Act are mutually exclusive that it is generally held that specific chattels are the subject of sections 1 and 2 and that funds alone are the subject of section 20. But, if one must now

take it that many of the sections of the Act do not create (or re-create) offences, but simply impose penalties, then, not only must many of our precedents for indictments be redrawn by omitting any reference to a section, but a single act can render the perpetrator liable under more than one section. There is nothing startling in such a state of affairs; it is simply that it is in this instance contrary to a view which has long been held by a large number of lawyers and plays havoc with the neat academic distinction between larceny by a bailee and fraudulent conversion.

It may be, of course, that, not for the first time, the Larceny Act has given rise to an expedient decision where the result is more satisfactory than the reasons given in support, when perhaps the implications of the reasoning were not fully realised. When that occurs, the extent to which the decision is logically followed tends to be capricious.

E. GARTH MOORE.

CONTRACT—OFFER AND ACCEPTANCE—PLACE OF ACCEPTANCE

THE Rules of the Supreme Court, Order 11 Rule 1, declare, *inter alia*, that "Service out of the jurisdiction of a writ of summons . . . may be allowed by a court or a judge whenever . . . (e) The action is brought . . . to enforce . . . a contract or to recover damages or other relief for or in respect of the breach of a contract (i) made within the jurisdiction." In the case of *Entores Ltd. v. Miles Far East Corporation* [1955] 3 W.L.R. 48, [1955] 2 All E.R. 493, the Court of Appeal was required to decide whether such service should be allowed in the circumstances of the case, and, in so doing, had perforce to express an opinion on a matter which has not recently been ventilated in such connections in English law, as to where the particular contract was made.

A contract consists of an offer and an acceptance of that offer. In order that the acceptance may be a valid one for the purpose of forming a contract, it has long been accepted that, as a general rule, the acceptance must be communicated to the offeror. Until the acceptance has been so communicated, the offeror is at liberty to withdraw his offer. As Bowen L.J. said in *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 at p. 269: "One cannot doubt that as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together." It follows that a contract in normal circumstances is made at the place where the offeror

receives notification of the acceptance of his offer, as in *Newcomb v. De Roos* (1859) 2 E. & E. 271.

In the case of transactions entered into by means of the post, however, this simple principle, based on the fundamental concept that a contract is an agreement between the parties, and, therefore, a consensus *ad idem* has to be established, was, in English law, modified. In this case the acceptance was and is deemed to be communicated to the offeror, and therefore the contract made, at the time and place when and where the letter of acceptance is delivered to the Post Office: *Household Fire Insurance Co., Ltd. v. Grant* (1879) 4 Ex.D. 216. The grounds upon which such a decision was reached are not clear, but three arguments have been put forward in favour of the rule. Winfield, *Select Legal Essays* (1952), p. 167, says that the first is that in such cases the Post Office is the agent of the offeror not only to deliver the offer but also to receive acceptance of it. Delivery of the acceptance to the agent is binding on the principal. The second view is that if there were not some definitive rule of this sort no contract by post could ever be entered into, although why this particular rule should be adopted is not clear. However, let us suppose A makes an offer to B by post. B accepts also by post. The argument is that if A is not bound to the contract until he receives notification from B that B has accepted the offer, then, logically, B should not be bound until he has been notified that A has received his acceptance and assented to it, and so on *ad infinitum*. Thirdly, it is said that the solution propounded is the better rule as far as transactions entered into by post are concerned because there will be more satisfactory evidence available, in the course of ordinary office routine, of the fact of posting. (But why? See Winfield, *op. cit.*, pp. 168-9.)

The reason for going into these points in such detail is that with the development of more mechanical and expeditious means of communication there has been a natural tendency to project these considerations into the new circumstances. So, it is undoubted that the principles applied to contracts entered into by post apply equally well to contracts made by telegram: *Cowan v. O'Connor* (1888) 20 Q.B.D. 640; *Tinn v. Hoffman & Co.* (1873) 29 L.T. 271, 274, 278. Difficulty has however arisen, and this is first revealed when the telephone comes to be used commonly in commercial matters. Although the use of the telephone involves employing the G. P. O. as an agent just as does the dispatch of a letter, the telephone is much more like a conversation face to face than an exchange of letters. So it is not surprising to

find that conflicting views are expressed in these cases as to exactly when and where, with such devices, a contract is made. In America (and the point is of importance, since Miles Far East Corporation was an American Corporation), although in the *Restatement of the Law of Contract*, § 65, it is declared that telephonic messages are governed by the same rules as oral acceptances when the parties are in the presence of each other, in decided cases (e.g., *Tideman & Co. v. McDonald*, 275 S.W. 70 (Texas)) there is a tendency to accept the theory of agency and correlate them with postal contracts (Williston, *Contracts*, I, ss. 82-3).

Into this context is projected the invention of Telex. There the two parties to a contract each have a machine rather like a typewriter. The machines can be connected with each other through the G.P.O. by means of a system of dialling resembling the telephone. Once so connected, anything typed on one machine is received, after a very short period of time and without the interposition of any human agency, by the other.

Miles Far East Corporation were an American firm with agents in Amsterdam; they entered into a contract with Entores, Ltd., of London through their Amsterdam agents, both Entores' and Miles' agents using Telex. It was not disputed that a contract was made. Entores had made an offer by Telex (in truth, a counter-offer) to buy 100 tons of Japanese Cathodes at £239 10s. a ton, which was accepted by Miles' Dutch agents, also by Telex. The question was, for the purpose of R.S.C., Ord. 11, r. 1 (e), where was the contract made: in London, where the Dutch agents' acceptance was received by Entores, or in Amsterdam, from where the Dutch agents dispatched their acceptance? If made in London, a writ of summons could be issued; if made in Amsterdam, no such writ was issuable.

The Court of Appeal held that the contract was made in London and that therefore permission to issue a writ could be given. The judgment of Denning L.J. proceeds from a distinction between "instantaneous" means of communication and the post. He accepts the general rule that it is the reception of the acceptance by the offeror that completes a contract. A contract made by word of mouth is the best example of a contract made by an "instantaneous" means of communication. He considers that a contract made by telephone is governed by the same principles as is a contract made by Telex. In such cases no difficulties arise if it happens that the means of communication fail. Each party is directly aware of what is happening or is at fault in not inquiring further if something unusual occurs. Birkett L.J. agreed

with him and so did Parker L.J., adding that although this was a case of the parties nominating a particular method of communicating an acceptance, they had, by doing so, not raised the implication that the offeror had waived actual notification.

It seems therefore that as far as English law is concerned the basic rule is that a contract is made at the place where the acceptance is received by the offeror, save in the case of contracts entered into by post or telegraph.

K. SCOTT.

NEGLIGENCE—STANDARD OF CARE—VICARIOUS LIABILITY

THE plaintiff in *Jones v. Staveley Iron and Chemical Co., Ltd.* [1955] 1 Q.B. 474, was an employee of the defendants engaged in moving loads of material. He and his colleagues attached them to a crane driven by a woman. The accident in which he was injured occurred when a load slipped and trapped his hand. He had failed to notify the crane driver that the hook of the crane was out of centre; she had failed to take the strain before lifting. Both mistakes contributed to the accident.

In the court below the employers succeeded. The judge held, first, that the plaintiff's behaviour did not amount to contributory negligence. He referred to the statement approved in *Caswell v. Powell Duffryn Associated Collieries* [1940] A.C. 152, that "it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence." But, secondly, he thought that the same test must be applied to the acts of the crane driver. Hers was no more than a risky error of judgment which could not on this basis be regarded as culpable. If anything, she was less at fault than the plaintiff.

The Court of Appeal agreed with the first finding, but not with the second. The same test could not be used to evaluate the acts of both employees. Negligence as a tort depended on a breach of a duty to take care; contributory negligence did not. Whereas a man may be allowed, in industrial conditions, to indulge in thoughtless acts at some risk to himself without incurring the stigma of contributory negligence, the duty to his fellow workmen will be broken by acts which are similarly careless of their safety. The "*Caswell* test" is appropriate to the first situation, not to the second. On such a question, it is perhaps unfortunate that a standard fashioned to prevent injustice under the law as it stood before the Law Reform (Contributory Negligence) Act, 1945, when apportionment was impossible, and in a case where the

defendant's duty was statutory, should now be applied at all in our case. If the test must be used, however, it is at all events easy to understand why the court did not wish to extend its scope so as to exculpate those who are willing to risk the safety of their fellows as well as their own. But the position is hardly satisfactory, especially if one asks what would be the position had the accident caused injury to the crane driver, and she, too, sued her employers. Presumably the loader is in breach of his duty to her. Each is liable to the other, and the employers vicariously to both—and liable in full if the "*Caswell test*" exculpates both from contributory negligence! This is an odd result, even if the employers can recover some contribution from each of them.

So to present the judgments in this case, however, is to pretend that they treated the problem as one concerning the standard of care required from the driver for whose acts the defendants might be *vicariously* liable. Although it is submitted with respect that this is the approach demanded by the previous cases, it was not quite that of Denning and Hodson L.JJ. Their judgments contain another, less acceptable, line of thought. After saying that the "*Caswell test*" cannot be applied to the driver because "Negligence is founded on a breach of duty, whereas contributory negligence is not," Denning L.J. goes on: "The employer is made liable, not so much for the crane driver's fault but rather for his own fault committed through her. He puts her in charge of a great machine which can cause much damage if it is not properly handled. He must see that reasonable care is used in the handling of it so that it does not cause damage. No matter whom he employs to handle it, he must ensure that a proper standard of care is obtained. He acts by his servant; and his servant's acts are, for this purpose, to be considered as his acts"; and later: ". . . the law expects a higher standard of care from *employers*" (*italics supplied*) "than it does from injured workmen; and this is so, no matter whether the employers are acting by superior servants or by fellow servants" (pp. 480-1). The employer is made personally, not vicariously, liable, and this is the reason for rejecting the "*Caswell test*" in respect of the driver's acts. Hodson L.J. agrees and cites (p. 483) cases like *Wilsons and Clyde Coal Co. v. English* [1938] A.C. 57, "which sets out in clear terms the duty of an employer to take reasonable care for his servant's safety. This duty is personal to him, a failure to perform which constitutes personal negligence even though he acts through the hands of another."

There is indeed a personal duty owed by the master to his servants; but it has never before obliged him to see that care is taken by each of the plaintiff's fellow employees in the work—to undertake, that is, to prevent collateral acts of negligence. The duty to provide a reasonably safe system of work, materials, conditions, instructed and competent staff, etc., surely stopped short at just that point.

It may be suggested that since the abolition of the doctrine of common employment this distinction between a master's personal and vicarious liabilities has, in such a case as ours, lost all meaning except to academic pedants, and that the Court of Appeal did no more than recognise the change. Such a suggestion is open to serious doubt. In the first place, if in our case the driver had been injured, could she have succeeded against the employers on the ground that they had through her (not even, as above, through the loader) failed in their duty to take care for her safety? Her acts are the master's, and the duty is now his, and if the "*Caswell* test" acquits her of contributory negligence, does she not succeed? The position is even more odd than when the orthodox approach of vicarious liability was adopted. Secondly, it is clear that the master's duty, even that to provide a competent staff, is still significantly different from that of a servant for whom he may be vicariously liable (see Munkman, *Employers' Liability*, p. 84). Thirdly, the importance of the new, wide personal duty is that it can be used to reject the principle of vicarious liability altogether, whether or not the plaintiff be a fellow employee, and to support the idea that "the master's liability for the negligence of his servant is not a vicarious liability, but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done" (Denning L.J. in *Broom v. Morgan* [1953] 1 Q.B. 597 at p. 609). Each lorry driver's employer is then "himself under a duty to see that care is exercised in the driving of the lorry on his business" (*ibid.* at p. 608). Objection is taken to this doctrine not because it is novel but because it seems to be further from reality even than the old rules. And if it has need of those difficult concepts "servant" and "course of employment" (and this seems so, see *ibid.* at p. 607) its advantages are hard to discover. If not, there is nothing in the doctrine to prevent the master's liabilities from being seriously and unfairly extended. In either case, the doctrine is a dangerous explanation of those situations in which the master is, but the servant is not, liable, especially if it leads, as Denning L.J. suggests in our case (at p. 480), to the conclusion

that the former may be liable even if action against the servant could be met by the defence of *volenti non fit injuria*.

Denning L.J. leaves one in no doubt that he intends this judgment to be another nail in the coffin of vicarious liability. He cites a trio of cases as authority for the new doctrine—*Broom v. Morgan* (*supra*), *Jones v. Manchester Corporation* [1952] 2 Q.B. 852 and *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 663. With respect, it is submitted that the doctrine is not part of the *ratio decidendi* in any of these cases. Whether or not it is still convenient, or is historically justified, to refer to the servant's acts as the "master's acts," that metaphysical notion surely cannot be used to sweep away in a judicial side-wind the fundamental concept of vicarious liability. The extension of the personal duty has enabled the common law to meet new demands, and none has been so adept at its use in this respect as Denning L.J., especially in the "hospital cases." But in situations where the boundaries of vicarious and personal liability have been clearly marked, it is difficult to find profit in their confusion. Such a development would impair the reality and elegance of the law, and might well bring into disrepute, in the eyes of that infallible appellate tribunal which does not suffer change lightly, those fortunate extensions of personal duty which have stood, so far, on the safe side of a conflict with authority.

K. W. WEDDERBURN.

EASEMENT—JUS SPATIANDI

IN *Re Ellenborough Park* [1955] 3 W.L.R. 91; [1955] 2 All E.R. 38, Danckwerts J. has held, in a considered judgment, that an easement conferring a *jus spatiandi* may be created by express grant in a deed. The circumstances were that the owner of a pleasure ground, surrounded on three sides by houses in the same ownership and on the fourth by the sea, had, on a sale in 1864 of some of the houses (the alleged dominant tenement), granted to the purchasers a perpetual right to the "full enjoyment" of the pleasure ground (the alleged servient tenement) which he retained. The learned judge construed this grant as conferring upon the purchasers and their successors in title a right by way of easement to walk about or to sit down on any appropriate parts of the pleasure ground, and possibly to picnic there. In so holding, his Lordship deliberately departed from the Roman law, as laid down in a text of Paul. Such a deviation would have required considerable courage, as the English law of easements is largely founded upon Gale's great textbook, and he in turn

frequently drew upon the Digest rules, had not the learned judge been referred to the case of *Duncan v. Louch* (1845) 6 Q.B. 904, 115 E.R. 341, an authority almost as venerable as the first edition of Gale which appeared in 1839, and one which clearly supported the decision of his Lordship.

The conclusion seems, with respect, to be a happy one. It appears that the present learned editor of Gale would not be hostile to it (12th ed. 1950, p. 23, footnote (c)), and Mr. Geoffrey Cross has incidentally supported, in a learned article ((1953) 15 Bell Yard 18, 22), the view now propounded *ex cathedra*. It must be conceded that 1845 was not a good year for easements, as it yielded the notorious case of *Wood v. Leadbitter*, 13 M. & W. 838, 153 E.R. 351, where the court was prepared to hold that a racecourse ticket might create an easement if by deed. This case demonstrates how fluid were the principles pertaining to easements in 1845, and in so far as it recognises the possibility of an easement in gross it has long since been overruled. *Duncan v. Louch*, however, contains no such heresy, and it is clear that the pleasure ground of Ellenborough Park conferred a benefit on the owners of the adjoining property as landowners, and increased the value of their houses, whereas Mr. Wood's ticket could not conceivably benefit any of his land even if he owned any in the vicinity of Doncaster racecourse. The Roman text of Paul to which the decision is contrary gives no reason for the opinion and does not seem to lay down any general principle: in fact the denial of a *jus spatiandi* as a possible servitude is coupled with an assertion that the right to pick apples on the land of another cannot be a servitude, whereas in English law such a right could clearly be created as a profit appurtenant, if limited to the needs of the dominant tenement.

It may be observed that it has been held by that very learned judge, Upjohn J., that a right tantamount to a claim to joint user of the servient tenement cannot be acquired as an easement by prescription: *Copeland v. Greenhalf* [1952] 1 T.L.R. 786, though his Lordship reserved his opinion as to a similar claim based upon express grant (at p. 791). A claim to a *jus spatiandi* of as large a kind as that before the court in *Re Ellenborough Park* could not therefore be sustained by mere evidence of long user.

R. N. GOODERSON.

TENANCY IN COMMON—STATUTE OF FRAUDS—RIGHTS OF OCCUPATION

In two recent cases the Court of Appeal has expounded the provisions of the Law of Property Act, 1925, which affect tenancies

in common of land. Any light on this difficult subject is always welcome.

In *Cooper v. Critchley* [1955] Ch. 431 the point was a short one: whether the sale of his share by a tenant in common was a sale of an "interest in land" within section 40 of the Law of Property Act, 1925, so as to require evidence in writing. The court held that it was, and showed a commendable willingness to deal with this far from easy point of law, although on the facts they found that no contract had been proved. Since the imposition of the statutory trust for sale upon joint tenants and tenants in common by the legislation of 1925 the cases have tended to emphasise the technical consequences of the doctrine of conversion, whereby the beneficial interest of a concurrent owner has become an interest in personalty, being an interest in the future proceeds of sale. But pending sale, even though in the eyes of equity the beneficial interest is already regarded as personalty, it is obvious that the beneficiary has also an interest in land: for the land is impressed with a trust for his benefit, and he can compel the trustees or their successors in title to carry out the trust by selling the land; or, with the concurrence of his co-owners, he can put an end to the trust and take the land itself. No one else but the co-owners is beneficially interested in the land, and the fact that it is in equity classed as personalty as between persons claiming it by succession is no reason why it should be taken out of section 40, which is founded on public policy. Nor is it material that an undivided share in land is excluded from the statutory definition of "land," for as Jenkins L.J. explained in his admirably clear judgment the statutory definition of "equitable interests" extends to interests in the proceeds of sale of land. The learned Lord Justice's general conclusions will no doubt be preferred to the narrower alternative mentioned at the end of his judgment, where he relies on the fact that the sale was by one tenant in common to the other, and that they were both joint tenants at law; for it would be unreasonable if the legal character of a co-owner's equitable interest were to vary because the purchaser had or had not also a beneficial interest of his own, or because of the whereabouts of the legal estate.

Bull v. Bull [1955] 1 Q.B. 234 arose out of a family quarrel. A and his mother bought a house for their joint home, but A contributed the greater part of the money and the house was conveyed to him alone. According to the usual rule of equity where purchase-money is contributed in unequal shares, the son became trustee of the house for himself and his mother as tenants

in common in shares proportionate to their contributions. The trust must, since 1925, be a trust for sale—although the case exposes one of the numerous gaps left in the drafting of the Law of Property Act, 1925, ss. 34–6, and no better rubric can be found than section 36 (4) of the Settled Land Act, 1925. The son married, and eventually attempted to turn his mother out of the house, bringing an action against her for possession. This action was clearly misconceived, in view of the son's position as trustee and his mother's equitable right to her share, if the property was to be occupied by the tenants in common personally. As Denning L.J. pointed out in his judgment (in which Hodson and Parker L.JJ. concurred), tenants in common are concurrently entitled to possession of the land pending sale and to the use and enjoyment of it in a proper manner; therefore neither of them is entitled to turn out the other.

But Denning L.J. went on to consider how the property could be sold, and this part of his judgment presents difficulties. It does not appear from the report whether either party wanted a sale, or whether their respective rights were argued by counsel. Certainly the son would have had to appoint a co-trustee before he could have sold, but that would have been only a formality. Furthermore the son, as the larger shareholder, should have had his own way in case of dispute in accordance with section 26 (3) of the Law of Property Act, 1925. But Denning L.J. laid it down that the trustees could not sell the property with vacant possession except with the mother's consent; and he said that if she refused her consent their only course would be to apply to the court for an order under section 30 on the ground that the consent was unreasonably refused. Why it should be in the power of a beneficiary with a minor interest to impede the execution of the trust for sale is something of a mystery. No doubt a beneficiary in possession would be entitled to reasonable notice if the trustees were to sell, like any other gratuitous licensee. But trusts for sale are not normally subject to the beneficiary's consent, unless the trust expressly so provides. The two statutory provisions called in aid by Denning L.J.—sections 14 and 35 of the Law of Property Act, 1925—do not appear to assist. It seems to be the fate of section 14, in particular, to be used as a kind of Pandora's box for the discovery of novel rights of possession (compare the next following note on *Westminster Bank, Ltd. v. Lee*). It must again be pointed out that the section, which is a saving for the rights of persons in possession, does not apply to "the Act," as Denning L.J. states, but to Part I of the Act, *i.e.*, the first 39 sections only.

It was surely cast for something much less than the leading role which it is now called upon to play.

If a concurrent owner with a minority interest who has been let into possession can impede the sale of the land and take the majority to court over the question whether his consent is reasonably withheld, this plainly conflicts with the provisions of section 26 (3) that in case of dispute the trustees should observe the wishes of the majority, according to the value of their interests. Denning L.J. accordingly says (at p. 238) that section 26 (3) applies "in theory," but that the trustees would be faced with the "practical difficulty" that "so long as the mother is there, they could not sell with vacant possession." But does not section 26 (3) mean that the mother would have no right to continued possession if the trustees duly proceeded to sell? What is the effect, one may wonder, of a provision of an Act of Parliament which operates only "in theory"?

HUSBAND AND WIFE—DESERTED WIFE'S RIGHT TO MATRIMONIAL HOME—EQUITABLE INTERESTS AND "MERE EQUITIES"

ONE of the many peculiarities of the newly-invented "equity" of a deserted wife to occupy the matrimonial home is the fact that every Chancery judge who has so far commented upon it has done so with aversion. This is an inauspicious start for an equitable right, and it is indeed surprising that other branches of the Supreme Court should thus be forcing unwanted members into a family of which the Chancery Division is the principal guardian. How this can happen is well shown in *Westminster Bank, Ltd. v. Lee* [1955] 3 W.L.R. 376, where Upjohn J. expressed his agreement with Jenkins L.J. and Harman J. who had in earlier cases doubted whether a deserted wife could be said to have an equitable interest binding third parties, but felt bound to follow the decision of Lynskey J. in *Street v. Denham* [1954] 1 W.L.R. 624—even though that learned judge's decision too was given "against his own view." Upjohn J. was the first judge of the Chancery Division to be faced with the deserted wife's "equity" in an inescapable form and his judgment is of the greatest interest.

The facts, simplified as far as possible, were that the husband, who owned the matrimonial home, deserted his wife in September, 1948, and two months later made an equitable mortgage of the house to the bank to secure his overdraft. Eventually the bank wished to enforce the security by sale, but the wife (having already secured herself against eviction by her husband: *Lee v.*

Lee [1952] 2 Q.B. 489) contested the bank's right to turn her out. The headnote states that the bank sought an order for possession against the wife, but it appears from the judgment that the bank did not intend to go into possession as mortgagee (which would have raised the question whether an equitable mortgagee is entitled to do so) but rather sought to establish that the wife could not stand in the way of their enforcement of the security, in order to pave the way for a sale with vacant possession. Upjohn J. decided in favour of the bank, on the ground that although the wife had an "equity" which would bind a purchaser with notice, the bank in fact had no knowledge that there had been desertion shortly before the mortgage, and the fact that the wife was in occupation of the house did not by itself put the bank on inquiry. He said that "the law does not require an intending purchaser or mortgagee, who has no reason to believe that a wife is deserted, to make any inquiry upon the footing that it is conceivably possible that she may be; that is not a reasonable inquiry. If the law were otherwise it would mean that every intending purchaser or lender must inquire into the relationship of husband and wife and inquire into matters which are no concern of his and will bring thousands of business transactions into the area of domestic life and ties. That could not be right. In my judgment the law is this, that (a mortgagee) is entitled to assume that a normal relationship exists as between husband and wife . . . On the other hand, if the intending mortgagee has notice of any fact which may put him on further inquiry as to whether the vendor has deserted his wife, or if having some suspicion, he wilfully abstains from inquiry to avoid notice, then the doctrine of constructive notice comes into play . . ." These welcome remarks are in accord with those of the same learned judge in *Lloyds Bank, Ltd. v. O.'s Trustees* [1953] 1 W.L.R. 1460 as disposing of some of the more extravagant possibilities which have been suggested. As was said in an earlier note in [1954] C.L.J. 72, it would be absurd if marriage were a blot on the title to the matrimonial home.

Upjohn J. also recorded his disagreement with the dicta of Denning L.J. in *Bendall v. McWhirter* [1952] 2 Q.B. 466 at p. 483 to the effect that the doctrine that possession constitutes notice applies without qualification to a deserted wife. This is refreshing, for although possession of the land by some independent third party of course puts a purchaser on inquiry, he can hardly be expected to be startled by the presence on the premises of the vendor's wife. In saying that Denning L.J.'s observations "went

too far " Upjohn J. also points out his mistake in holding that section 14 of the Law of Property Act, 1925, governs section 199 (1) (i) and that failure to register (if necessary) is therefore immaterial where the claimant is in possession. For section 14 is expressly confined to Part I of the Act (see the foregoing note also). But in the present case it was not argued that the wife's right should have been registered, no doubt because the bank took no legal estate.

It was the bank's lack of the legal estate which led to what is technically the most interesting of all the points decided. The owner of an equitable interest in land is normally secure against later equities, since equitable interests take priority in order of time and can be displaced only by a purchase without notice of a legal estate. But there is a difference between "equitable interests" and "mere equities"—examples of the former are a life interest or a mortgagor's equity of redemption, examples of the latter are the rights which equity will allow in some cases to set aside a deed for fraud or to rectify a document for mistake. In the second class of case the court will refuse to interfere against a subsequent purchaser without notice, even though his title is equitable only. In *Phillips v. Phillips* (1862) 4 De G.F. & J. 208, Lord Westbury L.C. said that this was a familiar class of case in the Court of Chancery, but his judgment probably crystallised a doctrine of which there are only faint traces in earlier reports, relating mainly to refinements of the old equity jurisdiction which perished with the Judicature Acts. Nor are subsequent references (*Cave v. Cave* (1880) 15 Ch.D. 639, *Cloutte v. Storey* [1911] 1 Ch. 18) very substantial. But Upjohn J. has now found a modern application for the doctrine, for he held that the deserted wife's right was at most a "mere equity" and so did not bind the bank.

The dividing line between equitable interests and mere equities is perhaps the discretionary character of the latter. Equitable claims to set aside deeds, or to secure their rectification, or to reopen a foreclosure, are at the discretion of the court in a way which does not apply to equitable titles such as those of beneficiaries under a trust or a mortgagor's equity of redemption. It is natural that the court should be unwilling to exercise its discretion to the detriment of an innocent purchaser, even though he lacks the armour of the legal estate. Since in *Woodcock (Jess B.) & Sons, Ltd. v. Hobbs* [1955] 1 W.L.R. 152 the majority of the Court of Appeal held that a deserted wife's "equity" is terminable in the discretion of the court, her rights naturally class themselves with the group of mere equities—for she can hardly have

it both ways. An equitable right of possession which is terminable in the court's discretion is nevertheless difficult to class with anything, as is well pointed out by a learned friend in 71 L.Q.R. 177.

Upjohn J. also touched upon the vexed question of the rights of a contractual licensee, and made it clear that he also can claim no more than a mere equity; for it rests on the court's willingness to restrain a breach of contract, and "does not depend upon the licensee having an estate or interest in the land." Those who have acclaimed licences as new equitable interests in land may therefore have to reconsider their terms. But plenty of problems will remain. For example, a purchaser's rights under an estate contract are surely more than a "mere equity," yet they rest on the court's willingness to award specific performance.

PROFIT À PRENDRE—RABBITING—DISPUTED TITLE

In *Mason v. Clarke* [1955] 2 W.L.R. 853 the House of Lords reversed the decision of the Court of Appeal which was the subject of a critical note in [1954] C.L.J. at p. 189. It may be said, with great respect, that a much more satisfactory result has now been achieved both as to the merits and the technicalities of the case—though at the cost of appeal to the supreme tribunal over property (a year's rabbiting rights) priced at £100.

As to the merits, it is remarkable that the dominant issue in the case was really one of fact, but nevertheless the Court of Appeal unanimously reversed the trial judge and the House of Lords unanimously reversed the Court of Appeal. The question was whether the plaintiff, who had paid £100 for a year's rights of rabbiting, had acted dishonestly in accepting a receipt on which were written the cryptic words "Towards bailiff's wages." If he had, he could not expect assistance from equity in enforcing a title based on an oral agreement supported by possession. The defendant's allegation was that the receipt was so framed in order to defraud the Inland Revenue; but "every attempt to show how the Revenue could be defrauded by it conspicuously failed" (Viscount Simonds at p. 860). The learned judge at first instance accepted the plaintiff's evidence that he had no suspicion of any plot, and assessed damages on the footing that unjustified accusations of fraud had been made. Yet the Court of Appeal (Somervell, Denning and Romer L.JJ.) insisted that the onus was on the plaintiff—who had merely accepted the receipt, and was not even the author of it—to explain the words or be presumed guilty of dishonesty. "In other words (said Lord Reid at p. 868) vague

suspicion is as good—or as bad—as actual evidence of fraudulent or dishonest intention. I am bound to say that this strikes me as both novel and erroneous.” Viscount Simonds said: “I should hesitate long before saying that a statement is inspired by a dishonest motive if I could not say what that motive was,” and “charges of fraud should not be lightly made or considered.” Thus their Lordships, not for the first time, have had to intervene to prevent the law relating to fraud from getting out of hand. Its tendency to do so is a curious and disturbing phenomenon, and a reminder that two tiers of appellate courts may not be too many.

As to technicalities, Viscount Simonds corrects (at p. 862) the suggestion apparently made by Denning L.J. that a person in possession of a *profit à prendre* cannot defend it against a third party without proving his title. Strictly speaking this point should have disposed of the whole case, for the defendant, although the agricultural tenant of the land, was a trespasser to the plaintiff's right of rabbiting; and as against a trespasser the plaintiff had a legal title by virtue of his possession. But the case was mainly fought on the plaintiff's equitable title, in which his possession also played a vital part as an act of part performance (see Lord Morton of Henryton's speech at p. 866).

The House did not investigate the question, also discussed in the previous note, whether a reservation of an easement or profit made under section 65 of the Law of Property Act, 1925, is to be construed in favour of the person who makes it or the person against whom it is made. Viscount Simonds (at p. 855) observed that “it is clear law that the so-called reservation operates as a regrant,” but he referred to no authority and there is nothing to indicate that he was doing more than to paraphrase section 65. The question of construction therefore remains in the anomalous state in which it was left by the Court of Appeal.

H. W. R. WADE.

NOTES ON CAUSATION AND RESPONSIBILITY IN ENGLISH LAW

LORD WRIGHT *

THAT eminent Law Lord, Lord Asquith, now, alas, no longer with us, was somewhat apologetic in comparing legal doctrines of Causation with those as he saw them of science and philosophy. I venture to question if there is any occasion for apology. The different sciences have developed in their own many ways in their efforts to satisfy the needs of human thought which have called them into life; this is particularly true of their treatment of what is called the relation of cause and effect. Lord Asquith truly said that "the philosophic doctrine of causation and the juridical doctrine of responsibility for the consequences of a negligent act diverge." They are dealing with different problems and the solutions must differ. Certainly the solutions or explanations propounded by philosophers, scientists and lawyers are different from what is after all a relative and empirical problem. Law in particular has no reason to blush for the results of its age-long efforts.

It is difficult to state precisely and comprehensively the legal notion of Causation. The idea is clearly a necessity too of human thought; it has been shaped to meet its requirements. Its nature for legal purposes can be traced pragmatically by analysing the different judgments in which it has been dealt with from time to time. Since Hume's famous pronouncement that the root idea of Causation is to be found in the constant conjunction of cause and effect, it has been recognised that we were not dealing with an eternal verity, but an experimental generalisation. People were and are still puzzled to explain how causes produce effects, as they are to explain how mind acts on matter. Many similes have been invented, such as that of the "chain" of causation (which a sceptic said must consist of missing links) or a network, or strings and many other like picturesque expressions which are thought to help to make the idea intelligible. But that effects follow causes is one of the necessary postulates of human thought, however expressed. It is a necessary part of our experience which we inherit and develop each in our own way from our earliest years. It enables us

* P.C., G.C.M.G., Honorary Fellow of Trinity College.

to adjust our actions and purposes on the footing of the uniformity of nature, however crudely conceived. In its more subtle developments science and technology all proceed on the basis that effects follow causes in moulding the future, though modern thought may want a new terminology. Lord Russell (a thinker eminent in both mathematics and philosophy) published in 1918 a collection of Essays called *Mysticism and Logic* which included a chapter on the "Notion of Cause." Though thought has changed a great deal since then I can quote the Essay because the book was reissued in 1953. Lord Russell is somewhat critical; he says (p. 171) that "the word causal is so inextricably bound up with misleading associations as to make its complete exclusion from the philosophical vocabulary desirable"; he adds "it is desirable to inquire what principle if any is employed by science in place of the supposed 'law of causality' which philosophers imagine to be employed."

The whole essay which I cannot quote adequately should be studied by lawyers when they feel tempted to assimilate the ideas which they use to those of philosophers and scientists. In truth it seems to me that such comparisons can only mislead. It is true that in legal inquiries, which depend on understanding sufficiently for their purpose an actual, physical, mental or moral event it is often necessary to describe as cause and effect, as if they were, as perhaps they are in a sense, actual sequences. The ordinary man's thought and language would so require. But beyond the actual happenings, the lawyer would look for a further element, what Lord Asquith called "the juridical doctrine of responsibility." I think it would be well for the lawyer to forget about philosophical doctrine of cause and effect, at best a shifting sand, as Lord Russell gives warning, and attempt to concentrate his attention on the action of causality as it works in the ordinary affairs of the life of the law. He will observe what Hume described in a memorable and often quoted passage, that a new element introduces itself in legal sentences, the element of "the ought," of legal duty and responsibility. That is a new idea to be contrasted with statements of fact. At once it becomes apparent that legal thought has a language and logic of its own and a method which looks at its chosen end, the determination of responsibility. The approach to Causation is from that angle. Responsibility involves a reasoned judgment such as is now often called a value judgment. The root idea then is the idea of the "ought," it must be "right," *i.e.*, based on true appreciation of moral theory. It is thus distinguished from judgment of fact.

Some modern jurists have claimed to exclude value judgments

from the category of legal judgments, as being merely subjective and unworthy to rank with judgments of fact. No doubt judgments of fact have a great role to play in every legal system especially an empirical system like the Common Law. But the strictly legal judgments must be value judgments, because they give effect to the idea of the "ought" in the relevant application. The mere statement of fact is not a legal judgment; it has no legal effect to say that one event caused another, when indeed the relation of cause and effect is purely factual and empirical and is a proposition of fact, not of law. I here disregard any purely *a priori* deductions such as some mathematical propositions. But the common law legal system contains as a necessary and integral part of its content, value judgments. While the judgment that an event has been caused by another particular event is not a value judgment and not a legal judgment, but a judgment of fact, it becomes a legal judgment if the facts are subsumed under some legal principle of value, of right and wrong, and the moral issues of responsibility can be applied. Lord Sumner in *British Columbia Co. v. Loach* [1916] 1 A.C. 719, made some important observations not always kept in mind. It was a personal injury case, in which the issue was what killed the man whose death was the subject of the action, whether it was his own fault so that his negligence was the sole cause of the accident. In that latter event the plaintiff would have no cause of action according to established law. Lord Sumner said "The question is not one of desert, or the lack of it, but of the cause legally responsible for the injury . . . The inquiry is a judicial inquiry . . . The object of the inquiry is to fix responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. . . . Till that has been done there may be a considerable sequence of physical events and even of acts of responsible human beings, between the damage done and the conduct which is tortious, and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of ascertaining liability, and how many more to other acts and incidents, which for this purpose are not cause at all." Lord Sumner then proceeds to give a long list of such epithets, such as efficient or effective cause, real cause, proximate cause, direct cause, decisive cause, immediate cause, *causa causans* on the one hand, as against on the other *causa sine qua non*, occasional cause, remote cause, contributory cause, inducing cause, condition and so on. "No doubt," he adds, "in the particular cases in which they occur they were thought to be useful or they would not have been used, but

the repetition of terms without examination in other cases has often led to confusion and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification."

It may be noticed that as a matter of words it has become common in judgments to speak of the "the cause" ("the" often being italicised) as in contradistinction to "a" cause or causes; the latter term is often used to indicate a complex of conditions, or circumstances previous, subsequent or concurrent, which have led to the casualty or event. Hence the common law was concerned to find what was the *sole* cause, the single cause which in a just reckoning precipitated the event—the sole cause in which the various preliminary or accessorial, inducing agencies were merged. A good early instance may be found in *Radley v. L. & N. W. Ry.* (1876) 1 A.C. 754, where the House of Lords relegated to a subordinate position what had appeared to the Exchequer Chamber to be contributory negligence. I think Lord Sumner was right in distinguishing causation from responsibility. Causation is a matter of fact, responsibility is a matter of legal decision; it is a value judgment as I have already explained. It may be a matter of some difficulty in some cases to single out, from the complex of inducing agencies, what is the cause to which must be attributed decisive potency. This may involve both fact and law and must depend on a wise survey of all the circumstances of the case. It thus to some extent bears a resemblance to negligence, which may for some purposes be defined as to consist in absence of due care in all the circumstances. Lord Reid has recently in a passage I shall later quote drawn attention to the particular character of the choice of *the* cause in particular cases. In *Caswell's* case I ventured to observe that the law has disregarded as contributory causes some acts of the plaintiff which might be regarded as in a sense negligence and treated them as of subsidiary moment in ascertaining the causation of the injury and has fixed attention on what was judged to be the dominant cause. Hence the question was stated, as it was in *Swadling v. Cooper* [1931] A.C. 1, to be what was the substantial cause. According to Lord Sumner it would be enough to ask what was "*the*" cause. When it is seen what the law means by "the cause" the difficulty of the selection becomes much less serious.

The idea of the single cause is not peculiar to law. It is a deep-seated instinct of the human understanding and in practical life is being constantly put into effect, almost as a matter of course. Like negligence, the practice cannot be reduced to a hard and fast

formula, or decided by the method of the slide-rule. The importance of the principle of responsibility in connection with causation may indeed seem peculiar to law. But where causation is in any sense material the necessary tendency to the selection of the cause is present. In historical thought this has been illustrated by an excellent little book by Professor Marc Bloch, a French patriot who gave his life in the Resistance. I may quote a brief passage from the excellent translation, published Manchester 1954, from the chapter dealing with Historical Causation. At page 190 he refers to the fact that "establishment of relations of cause and effect constitute an instinctive need of our understanding" but adds that it "demands a conscious critical treatment." He then has some pages on the theory of the single cause. "Let us suppose" he says, "that a man is walking along a mountain path. He trips and falls off a precipice. For this accident to happen the combination of a great number of determining elements was necessary, such as among others the existence of gravity, a terrain resulting from protracted geological changes, the laying out of a path for the purpose, let us say, of connecting a village with its summer pastures. It would therefore be perfectly legitimate to say that were the laws of celestial mechanics different, had the evolution of the earth been otherwise, were alpine economy not founded on the seasonal migration of flocks, the fall would not have happened. Nevertheless, should he inquire as to the cause, everyone would answer: a mis-step." If space permitted, I should like to give a longer quotation of his view why "we can scarcely avoid the feeling that it was the sole cause." He adds that from the point of view of common sense, which has always been reluctant to rid itself of a certain anthropomorphism, in speaking of cause, we fix on this last-minute component, this specific and unexpected component. He refers to the subordination of the perspective to the peculiar angle of the inquiry, and the search for a value judgment. The judge expresses it as: who is right and who is wrong.

It has been said that strictly speaking the cause of any event is the whole state of the universe at the critical moment. But obviously such a view would be fatal to rational action. The approach of the judicial inquiry is the quest of justice, the search for the responsible person. Lord Sumner's statement was made with reference to a claim for personal injuries for tortious conduct. It would substantially apply to charges of crime, and indeed to all cases in which it is sought to establish responsibility for wrongful action. It might also with a little adjustment apply to the numerous lawsuits in which the issue arises in regard to a particular obligation in which the obligation is expressly described, such as

contracts or statutes, and the question is whether the facts can be fitted into statutory framework. The judicial inquiry is *ex post facto* and seeks to fix or negative liability. In addition to the construction of the terms of the obligation, there are generally issues of fact in order to decide responsibility. In the end the whole will tend mostly to converge on the single cause. The "monism of Cause" will force itself to the front.

It is not easy to choose instances to illustrate this because they are so multifarious that the principle seems axiomatic. I can illustrate that later in cases to which I shall refer but it must be familiar to all common lawyers who have had long and wide experience of actual practice at the Bar or on the Bench. I may perhaps usefully take one or two instances from a vast number of possibles, which may also illustrate what has been called competition of causes, that is a contest which of several possible causes is *the* cause. This the court (judge or jury) must decide.

I shall not seek to develop but might refer in passing to another category of cases which involve the decision of questions of cause and effect—I mean in cases of damage where the liability of the defendant is limited to such consequences as are not too remote. In cases of contract that generally depends on the rules laid down in *Hadley v. Baxendale*, and sometimes a standard is fixed by the contract. In cases of injury in general the consequences may by law be limited to what can be reasonably or naturally contemplated. As extreme illustrations I may mention two out of hundreds, *The Oropesa* [1943] P. 32 and *Summers v. Salford Corporation* [1943] A.C. 283. In such cases also the monism of cause is generally observed. And equally "Cause" means responsible cause.

There are a vast number of decisions on the question of the contest of causes. I can only cite two or three all, as it happens, connected with the sea and maritime affairs. The great case of *Samuel v. Dumas* [1924] A.C. 431 centred on the decision whether a ship separately insured against sea perils and war risks, was lost by the one peril or the other. The ship was shown to have been criminally scuttled by her owner in order to collect the insurance moneys but physically and in the last resort she sank because the sea connections had been opened deliberately to fill her with water. There was a great contest and conflict of opinion but in the end *the* cause was held to be the criminal action of her owners, and the claim failed. Among a host of authorities I may cite *Yorkshire Dale S.S. Company case* [1942] A.C. 691 where though the sea actually did the damage, the war risk was held on the facts to be *the* cause. The headnote states a principle of wide application.

“The proximate cause of the loss of a ship is not necessarily the one which operates last, but is the effective and predominant cause selected from among co-operating causes. This choice of the real and effective cause from out of the whole complex of the facts must be made by applying common-sense standards.” A similar case, *The Priam* [1948] A.C. 243, was a further illustration. The quest throughout is to find *the* cause on which responsibility depends.

I have spent a good deal of space in seeking to explain the monistic view of legal causation but it could only be satisfactorily justified by a complete anthology of the illustrative cases. One would not expect to be provided with all the cases in which negligence has been established. The common lawyer has a sufficient store in his own mind and his experience: in the same way every common lawyer who gives it a brief thought would be conscious of the general effect in his mind of the particular instances which crowd upon it. The rule is clear and simple however multifarious the particular instances. It is noteworthy that Lord Porter, who has been concerned with such cases for thirty years or more, was content in *Stapley v. Gypsum Mines, Ltd.* (*infra*) to state the rule and apply it as little more than an obvious conclusion: he had indeed in a careful judgment explained the situation and that seemed to him enough. There may be difficult cases where it is doubtful if the dominating cause which is necessary to found responsibility is sufficiently clear, or where there are complicating circumstances which need to be weighed. Hence Lord Reid’s caveat¹ which I quote below. But the broad rule stands; its subject is the decision of particular cases and on the particular circumstances of these cases what the facts require; and in the appropriate case, the fixing of *the* sole cause is the culminating point of the judicial inquiry, and requires the highest qualities of judicial ability.

Liability may of course be shared by several persons, as where you have joint or concurrent wrongdoers, each in his particular way, causing the event. As illustration I may quote *Grant v. Sun Shipping Co.* [1948] A.C. 549. And the sharing may be between the plaintiff and the defendant, as is now provided by the Law Reform (Contributory Negligence) Act of 1945. It will be enough here to take as a mere illustration of the difficulties arising a case which recently went to the House of Lords, *Stapley v. Gypsum Mines, Ltd.* [1953] A.C. 663.

The action was brought by the widow, Mrs. Stapley, claiming

¹ “To determine what caused an accident from the point of view of legal liability is a most difficult task . . . Sometimes it is proper to discard all but one and to regard that one as the sole cause . . . I doubt whether any test can be applied generally.” [1953] A.C. at p. 681.

damages from the defendants for the death of her late husband caused by their negligence as employers. Before the trial judge, Sellers J., only two of the original heads were considered, which were that the company failed to make the stope or working place secure contrary both to common law and to applicable regulations. The stope or working place was dangerous because the roof might fall and kill any man working under it. Hence the most stringent regulations and statutory rules, and stringent rules of the workers' obedience to orders. The dangerous part of the roof was apparent because it was "drummy," *i.e.*, gave a hollow sound if tapped. The judge held that the company had failed to keep the roof of the stope safe, so that it fell and killed Stapley but that Stapley was partly in fault and partly responsible because he had deliberately resumed work in breach of the law and of the applicable regulations and contrary also to the orders of the foreman, who on the roof being found "drummy," said "fetch it down" which amounted to an order not to work under the roof until by recognised methods it had been brought down and the place made safe. In effect the judge held that the company was liable for Stapley's death, but that 50 per cent. should be deducted because Stapley had been contributorily negligent in resuming work under the drummy roof. The Court of Appeal reversed that decision, in particular on the ground that "if the inquiry to be made is: What was the cause of Stapley's death? then the answer must be that it was his own breach of duty in resuming work under the drummy roof. If he had not done that, it is obvious he would not have been killed" (I quote from the judgment of Birkett L.J.).

When the case went to the House of Lords there was a difference of opinion: the widow was held by the majority, Lords Oaksey, Reid and Tucker, entitled to recover but the damage was reduced from 50 per cent. to 20 per cent., because of the deceased man's breach of duty and misconduct in resuming work under the drummy roof—which was treated as contributory negligence. The dissentient minority, Lords Porter and Asquith, agreed with the decision of the Court of Appeal; thus Lords Porter and Asquith were prepared to settle the issue on the simple ground of the sole cause, of the answer to the question "who caused Stapley's death?" The whole event in Lord Porter's words was "brought about by his own return to the stope." Lord Porter found there a complete and simple answer which superseded any further analyses or refined reasoning, or any investigation of antecedent or accessorial inducing conditions. It was an independent affirmative act, final in character. Stapley in defiance of all safety rules of the mines, of all his own experience, of the whole discipline of the mines, of the

foreman's specific order, deliberately of his own self-will went into a place of certain danger; it was as it were a fresh departure, what I have elsewhere called an ultroneous act. It was amply sufficient to account for his death: no further explanation was to be sought or found in the various conditions existing before the fatal moment. Lord Asquith gave some parallels from history which may seem a little far-fetched but do emphasise his point that Stapley's act had a "revolutionary" character in the small circle of ordinary working life into which it was suddenly projected. The result in its insignificant setting was cataclysmic. There were all the elements which would justify the conclusion of the *ex post facto* judicial inquiry as voiced by Lord Porter. That was the particular finding in that particular case. Like all such it is a specific finding "in the circumstances." Lord Porter after his judicial summary of the situation found no occasion for further justification.

I cannot see that this conclusion is affected by the Act of 1945, on contributory negligence. I am content to follow Lord Porter in thinking that the suggested reasons for rejecting the conclusiveness of the ultimate cause, which merged and superseded all the conditions that went before, fail. In truth, even if they were to be brought into reckoning, they fully deserve Lord Porter's summation that they were "elusive and difficult." I cannot prolong this essay to examine the suggested contributory negligence. Lord Porter shrewdly observes that if he accepted the view of the House of Lords on the point he would place the degree of blame attributable to anyone other than Stapley at an infinitesimal quantity, but he expresses no opinion. But I refrain from further criticism because the object of this essay is, as I have said, to emphasise once more the legal theory of cause and also the wide importance in the law of tort of the theory of the sole or monistic cause.

THE BASIS OF LEGAL SOVEREIGNTY

H. W. R. WADE

THE great South African case of *Harris v. Minister of the Interior*¹ will have turned the thoughts of many lawyers to the subject of legal sovereignty. Under English law the principle of the sovereignty of Parliament, "the dominant characteristic of our political institutions,"² is supposed to be something very simple and clear—and so indeed it appears in its classic exposition in the pages of Dicey. But the classic exposition is now widely controverted; an example may be taken from the recent remark of the Lord President of the Court of Session³:

"As is well known, the conflict between academic logic and political reality has been emphasised by the recent South African decision as to the effect of the Statute of Westminster—*Harris v. Minister of the Interior*."

What is more, on the rare occasions when courts in England or the Commonwealth find themselves concerned with the validity of Acts of Parliament, further conflicts are revealed in the comments of text-writers who discuss these cases. There seems to be a widening rift between the orthodox propositions which the courts lay down and the speculative deductions of critics who delve deeper beneath the surface towards the bedrock of constitutional theory. Inferences which to many people would seem to be

¹ 1952 (2) S.A. 428; [1952] 1 T.L.R. 1245; Keir and Lawson *Cases in Constitutional Law* (4th ed.) 506. For comment on the case see 68 L.Q.R. 285; 65 Harv.L.R. 1361; 30 Can.B.R. 692, 734; 31 Can.B.R. 52. After losing this case the South African Government attempted to achieve its ends by establishing special courts for such questions, since the legislature has power to establish courts of law without recourse to the "entrenched" procedure; but the Act constituting Parliament itself into such a court was held illegal: *Minister of the Interior v. Harris and Others*, 1952 (4) S.A. 769. The government has now procured legislation for increasing the number of appellate judges and the number of Senators: Appeal Court Quorum Act, 1955; Senate Act, 1955.

A most valuable commentary on the principal case will be found in Professor D. V. Cowen's two articles on "Legislature and Judiciary" in 15 M.L.R. 282 and 16 M.L.R. 273, to which as will be seen the present article is much indebted. Its object is not to survey further the voluminous literature on sovereignty, but to attempt to bring to a head the current controversies on the subject. In a sense, therefore, it starts at the point where Professor Cowen leaves off, for after his excellent account of the background and the arguments of both sides he concludes that the fundamentals of the subject are "fluid, elusive and obscure."

² Dicey, *Law of the Constitution* (9th edition by Professor E. C. S. Wade), 39.

³ *MacCormick v. Lord Advocate*, 1953 S.C. 396 at p. 412.

merely corollaries of propositions laid down by the courts can be shown to conflict with the beliefs of such authorities as Dicey, Anson, Sir Ivor Jennings, Sir David Keir, Professor Lawson and Professor Friedmann. Nor are they all of the same mind among themselves. The more deeply the subject is explored, the more one is inclined to suspect that the bedrock will turn out to be quicksand.

All writers on sovereignty are bound to deal in improbable examples. One has to ask what would happen if Parliament tried to abdicate, or to alienate its powers, or to impose restrictions on future legislation after the manner of the South African entrenched clauses. In England these may seem academic questions; but the improbable case will often throw light on the actual. For example, all the argument in *Harris v. Minister of the Interior* proceeded on the assumption that the central question—whether the “entrenched” clauses of the South African constitution were still entrenched since the Statute of Westminster—was a strictly legal one, to which there was a right or a wrong answer, according to the existing law. But, if one first considers the abstract question of the alienability of sovereign power, one may reach the conclusion that the issue before the South African courts was fundamentally different from any other ordinary legal issue, and that the courts were really called upon for a political or legislative decision, having no “law” to guide them, but having to create new law in a situation which should strictly be called revolutionary. The theoretical analysis, if it is accepted, then makes it easier to understand the reasoning followed by the Appellate Division in deciding the case.

Another case which is bound to be in the forefront of the discussion is *Att.-Gen. for New South Wales v. Trethowan*,⁴ the well-known decision of the Judicial Committee of the Privy Council. Although that case was, on a narrow view, no more than a decision on a particular provision of the Colonial Laws Validity Act, 1865, its highly interesting set of facts has been made the basis of some remarkable predictions about the power of the Parliament of the United Kingdom. After nearly twenty-five years it is still a source of thought-provoking comments, which doubtless has not yet run dry. This is all the more remarkable since the case in no way raised any question of the validity of acts of a sovereign legislature, but was rather concerned with subordinate, or delegated, legislative power. This paradoxical situation is typical of the subject, for the English courts have hardly ever

⁴ [1932] A.C. 526.

had to consider whether an Act of the Parliament of the United Kingdom was or was not valid.⁵ To build up any theory of legal sovereignty is to try to make bricks without straw, unless full advantage is taken of a handful of decisions, notably cases from countries of the Commonwealth, in which the courts have indirectly given clues to their innermost secrets.

An orthodox English lawyer, brought up consciously or unconsciously on the doctrine of parliamentary sovereignty stated by Coke and Blackstone, and enlarged upon by Dicey, could explain it in simple terms. He would say that it meant merely that no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts; that it was always open to the legislature, so constituted, to repeal any previous legislation whatever; that therefore no Parliament could bind its successors; and that the legislature had only one process for enacting sovereign legislation, whereby it was declared to be the joint Act of the Crown, Lords and Commons in Parliament assembled. He would probably add that it is an invariable rule that in case of conflict between two Acts of Parliament, the later repeals the earlier. If he were then asked whether it would be possible for the United Kingdom to "entrench" legislation—for example, if it should wish to adopt a Bill of Rights which would be repealable only by some specially safeguarded process—he would answer that under English law this is a legal impossibility: it is easy enough to pass such legislation, but since that legislation, like all other legislation, would be repealable by any ordinary Act of Parliament the special safeguards would be legally futile. This is merely an illustration of the rule that one Parliament cannot bind its successors. It follows therefore that there is one, and only one, limit to Parliament's legal power: it cannot detract from its own continuing sovereignty. It is tempting to add that Parliament's power is therefore inalienable, but that is to anticipate a question which must be investigated later on. For, leaving that point aside, we have already entered the area of controversy. Even the proposition that English law knows no means of "entrenching" sovereign legislation, which most English lawyers would accept as a self-evident truth, has been questioned or denied by leading authorities.

Suppose that, as happened in *Trethowan's* case, an Act should provide that no bill for repealing it should be presented for the royal assent unless approved by a majority of the electorate in

⁵ For a case of 1670 see below, note 46; and see the case of *Sir John Pylkington* (1454-5) Y.B. 33 Hen. VI, fo. 17, p. 8, referred to in Craies, *Statute Law*, 5th ed. 34, and discussed by Professor Cowen in 16 M.L.R. at pp. 276-7.

a referendum; and that, as one must also postulate if the example is to hold good for a sovereign legislature, any repealing Act not so approved should be void and of no effect. Next suppose that Parliament, wishing to retrace its steps, passes a repealing Act by its ordinary procedure, with no referendum, and the royal assent is duly given. Is the repeal effective? The orthodox answer is in the affirmative, and at least three well-known judicial decisions can be cited: *Vauxhall Estates, Ltd. v. Liverpool Corporation*⁶; *Ellen Street Estates, Ltd. v. Minister of Health*⁷; and *British Coal Corporation v. The King*.⁸ The first two cases turned on the provision of the Acquisition of Land (Assessment of Compensation) Act, 1919, that the provisions of any Act authorising acquisition of land, if inconsistent with the Act of 1919, "shall cease to have or shall not have effect." Provisions which were in certain respects inconsistent were made by the Housing Act, 1925, and it was argued that the words of the Act of 1919 made it proof against the implied repeal which would otherwise have occurred. This argument was rejected by the judges, and, in the second case, by the Court of Appeal. In the *Vauxhall Estates* case Avory J. said⁹:

"It must be admitted that such a suggestion as that is inconsistent with the principle of the constitution of this country. Speaking for myself, I should certainly hold, until the contrary were decided, that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions."

And in the *Ellen Street Estates* case Maugham L.J. said¹⁰:

"The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature."

It is important to note that Maugham L.J.'s statement is particularly concerned with the impossibility of requiring any particular *form* for subsequent legislation, for thus his remarks extend equally well to our imaginary example of an Act purporting to make itself

⁶ [1932] 1 K.B. 733.

⁷ [1934] 1 K.B. 590.

⁸ [1935] A.C. 500.

⁹ At p. 743.

¹⁰ At p. 597

unrepealable except after a referendum. Since Parliament's power to repeal is unqualified, it is no more possible to prescribe effectively that a repealing Act shall be in some particular form or be enacted by some special procedure than that there shall be no repeal at all, or no repeal within a certain period of time. But, since questions of "manner and form" (a phrase drawn from the Colonial Laws Validity Act, 1865¹¹) figure so prominently in this subject, it is worth while emphasising that the question of form was squarely before the court in the *Vauxhall Estates* and *Ellen Street Estates* cases. This was because counsel conceded that the Act of 1919 would have to yield to an express repeal, but contended that its language protected it from implied repeal where some later Act merely contained some inconsistent provision. In other words, he contended that in 1919, by enacting that inconsistent provisions "shall not have effect," Parliament had altered the rule of law which says that where two Acts of Parliament conflict, the later repeals the earlier by implication. Since he conceded that an express repeal would have been effective, he was arguing in effect that the Act of 1925 was defective in form for the purpose of repealing the Act of 1919, for want of some formula expressly effecting the repeal. In rejecting this argument the courts were for the same reason holding that it was just as impossible for an Act to be made proof against implied repeal as against express repeal. Even if this was the intention of the Act of 1919 (which as a matter of construction was at least doubtful), the will of an earlier Parliament must give way to the will of a later Parliament. Here, therefore, were two decisions where it was held that the law-making process was not at the mercy of Parliament for the time being, but was guarded by the courts in order that future Parliaments might be unfettered. That the courts should have the function of guarding this doctrine against the provisions of an Act of Parliament is not really surprising, since it is only an application of the principle that Parliament cannot bind its successors. Nevertheless the conclusion that there exists a rule of law which Parliament is incompetent to alter challenges further analysis.

The third case, *British Coal Corporation v. The King*, is familiar to all students for the memorable remark of Lord Sankey L.C. (delivering the judgment of the Judicial Committee of the Privy Council) about the possibility of repeal of the Statute of Westminster, by which legislative independence was given to the Dominions¹²:

¹¹ s. 5.

¹² At p. 520.

“It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation it thought fit extending to Canada remains in theory unimpaired: indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities.”

Section 4 of the Statute provides that no Act of the United Kingdom Parliament shall extend to a Dominion unless the Act expressly declares that the Dominion has requested and consented to it. This again is an attempt to control the form of later legislation—to limit its legal effect unless it contains a certain form of words.¹³ The same point could therefore arise as arose in the *Vauxhall Estates* and *Ellen Street Estates* cases, if (to assume the unthinkable) an Act of the United Kingdom Parliament were to purport to extend to a Dominion without making the proper recitation of the Dominion's request and consent. All English precedent would lead one to predict that an English court would regard itself as bound to give effect to the later statute, and would hold that to the extent of any inconsistency with the Statute of Westminster the Statute of Westminster was repealed.¹⁴

Those who, like the writer, look upon the foregoing propositions as statements of the obvious, may be surprised to find how freely they are contradicted by writers whose opinions command the greatest respect. The most masterly and the best known of these critiques is the knotty passage in Sir Ivor Jennings' *The Law and The Constitution* entitled “Limitation of a Sovereign Power.” Although the learned author does not categorically deny the truth of the conventional theory as stated by Dicey, he denies that there is any legal authority for it, except the dictum of Lord Sankey L.C. in *British Coal Corporation v. The King*¹⁵; and his own sympathies clearly lie with an alternative theory to which he devotes most of his text, and which he argues with great lucidity. The heart of the passage is as follows¹⁶—

“If a prince has supreme power, and continues to have supreme power, he can do anything, even to the extent of undoing the things which he had previously done. If he grants a constitution, binding himself not to make laws except with the consent of an elected legislature, he has power

¹³ See Jennings, *The Law and the Constitution*, 3rd ed., p. 145.

¹⁴ The meaning of the South African counterblast “Freedom once conferred cannot be revoked” (Stratford A.C.J. in *Ndlwana v. Hofmeyr*, 1937 A.D. 229 at p. 237) will appear later.

¹⁵ Note 12, above.

¹⁶ At p. 142.

immediately afterwards to abolish the legislature without its consent and to continue legislating by his personal decree.

"But if the prince has not supreme power, but the rule is that the courts accept as law that which is made in the proper legal form, the result is different. For when the prince enacts that henceforth no rule shall be law unless it is enacted by him with the consent of the legislature, the law has been altered, and the courts will not admit as law any rule which is not made in that form. Consequently a rule subsequently made by the prince alone abolishing the legislature is not law, for the legislature has not consented to it, and the rule has not been enacted according to the manner and form required by the law for the time being.

"The difference is this. In the one case there is sovereignty. In the other, the courts have no concern with sovereignty, but only with the established law. 'Legal sovereignty' is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the King, 'with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same,' will be recognised by the courts, *including a rule which alters this law itself*. If this is so, the 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.

"This may be illustrated by a recent decision of the Judicial Committee of the Privy Council."

Trethowan's case is then given, apparently intended as an example of a "legal sovereign" able to impose legal limitations on itself. The main theme is then taken up again¹⁷:

"The law is that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law or by the Parliament Act of 1911. But Parliament may, if it pleases, provide another manner and form. Suppose, for instance, that the present Parliament enacted that the House of Lords should not be abolished except after a majority of electors had expressly agreed to it, and that no Act repealing that Act should be passed except after a similar referendum. There is no law to appeal to except that Act. The Act provides a new manner and form which must be followed unless it

¹⁷ At p. 144.

can be said that at the time of its passing that Act was void or of no effect.”

Applying these alternatives to the Statute of Westminster, section 4, the author states ¹⁸:

“It is not possible to rebut this argument (*sc.* that Parliament can lay down a binding manner and form for future legislation) except by saying that this provision (*sc.* s. 4) is void. The power of Parliament given by law, it must be said, is not a power to pass any legislation whatever, but a power to pass any legislation which does not limit its own authority. Since this is a matter of common law, this must be proved by decisions of the courts. No such proof can be offered (though for that matter no such proof can be offered that the other is the correct interpretation).”

Apart, therefore, from arguments founded on what Parliament has actually done, such as the amendment of the sacrosanct terms of the Union with Scotland Act, 1706 ¹⁹—and Jennings allows that these, so far as they go, support Dicey ²⁰—we are told that the legal position is completely obscure.

Professor Friedmann has gone further, and has stated quite positively that the United Kingdom Parliament can bind its successors. Discussing *Trethowan's* case, he writes ²¹:

“Because the Colonial Laws Validity Act laid it down that non-sovereign Parliaments, such as the New South Wales Legislature, could make laws respecting their constitutional powers and procedure only ‘in such manner and form as may from time to time be required by any Act of Parliament . . .,’ this question has become mixed up with the distinction between ‘sovereign’ and ‘non-sovereign’ legislatures, which is irrelevant to this problem. In fact, this provision of the Colonial Laws Validity Act only formulates a position which exists just the same for ‘sovereign legislatures’ operating under flexible constitutions, that is, with a machinery of constitutional change by simple statute. The recent shortening of the veto power of the House of Lords from two years to one year has brought this out . . . any change in the legislative process itself must be effected in the manner and form of the existing provisions. That a Parliament cannot fetter its

¹⁸ At pp. 145-6.

¹⁹ See Dicey, *Law of the Constitution*, 9th ed., 65-6, and Jennings, *The Law and the Constitution*, 3rd ed., pp. 146-7.

²⁰ But now see *MacCormick v. Lord Advocate*, note 29 below.

²¹ In an article in 24 *Australian L.J.* 103 (1950), at p. 104.

successors is true only in the sense that it cannot tell them what policy to pursue in regard to any specific subject-matter. On this, English and Australian cases are in agreement."

The reader's eye travels avidly to the footnote to this final statement, for it is exciting to hear that English cases have decided that Parliament can in some sense bind its successors. But all he finds is "*See Vauxhall Estates v. Liverpool Corporation.*" Since that case and its more authoritative counterpart the *Ellen Street Estates* case lay down the precise opposite of Professor Friedmann's proposition as to "manner and form" (for, as we have seen, they hold that it is contrary to the fundamental law of the constitution for Parliament to be bound by the Acts of a previous Parliament, whether as to form or anything else), the reader is left wondering. Nor does the Australian authority appear to come any nearer to the mark.²² Yet Professor Friedmann does not express any doubt, but goes on to quote, as if it were clear law, Sir Ivor Jennings' argument (already given) that a legal sovereign may impose legal limitations upon itself because it can alter the legal rules as to what is valid legislation. Jennings' proposition, however, was put forward only as one of two alternatives, which were both stated to be, in the present state of the authorities, incapable of legal proof.

It should be noted in passing that Jennings and Friedmann are in agreement in rejecting as irrelevant any distinction between sovereign and subordinate legislatures—which was one of the principal points of Dicey's analysis²³—and in taking *Trethowan's* case as an example which will serve for the Parliament of the United Kingdom just as well as for the Parliament of New South Wales.

Another shade of opinion is expressed in the valuable case-book of Sir David Keir and Professor Lawson. They pay full tribute to the authority of the *Vauxhall Estates* and *Ellen Street Estates* cases as proving the point that "Parliament" cannot bind its successors; but they suggest that there is room for doubt "in respect not of the extent of that authority (*sc.* Parliament's) but of the composition of the body by which it is exercised." They regard the Parliament Acts of 1911 and 1949 as establishing a sovereign body consisting only of the Crown and the Commons; and they say that "were a referendum to be introduced, the electorate might become for certain purposes an additional House

²² *Magrath v. Commonwealth* (1944) 69 C.L.R. 156 is cited, but all the judges in that case (Rich J. at p. 170, McTiernan J. at p. 175 and Williams J. at p. 183) state clearly the ordinary rule that Parliament cannot bind its successors, without any qualification of the kind suggested by Professor Friedmann.

²³ *The Law of the Constitution*, Chap. II.

of Parliament.” Then, after a quotation from *Trethowan’s* case,²⁴ they say ²⁵:

“ . . . a Parliament having the same composition as the Parliament which passed the Act requiring a referendum, and using the same procedure, could repeal that Act. But this only means that a skilful draftsman would protect—or, to use the term common in South Africa, entrench—the Act by providing that no Bill purporting to repeal it should have effect unless approved by referendum.”

This appears to mean that under English law—for it is clear from the context that the United Kingdom Parliament is under discussion—it is only a matter of choosing the right words for Parliament to be able to enact entrenched clauses which will be unrepealable except in accordance with those clauses. And, once again, it appears to be assumed that *Trethowan’s* case is an example which would hold equally good in the United Kingdom. Thus what is said to be a special subject of doubt, limited to the question of Parliament’s composition, turns out to be wide enough to include the usual examples of “manner and form.”

The exception could therefore swallow up the rule, and how it can be reconciled with the English cases is not explained. Would it really be possible, by the use of what is said to be a “simple device,” for the United Kingdom Parliament to make an Act virtually unrepealable by requiring any repealing Act to be approved by, say, ninety per cent. of the electors in a referendum? ²⁶ Yet hard on the heels of a conclusive quotation from the *Ellen Street Estates* case follows this statement that to entrench Acts of the United Kingdom Parliament is only a matter of drafting.

These passages show how little confidence the leading authorities have in the classical theory of sovereignty which Dicey propounded.

²⁴ The quotation is the well-known passage from the judgment of Dixon J. (as he then was) in the High Court of Australia, 44 C.L.R. at p. 426, in which he discussed the possible outcome of a case of the same type in England. He suggested that if an Act was passed without a referendum to repeal an Act which purported to be repealable only after a referendum, “the courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.” And he added that “the answer to this question, whether evident or obscure, would be deduced from the principle of parliamentary supremacy over the law.”

This is a carefully guarded statement. If, as Keir and Lawson appear to infer, it hints at the conclusion that the courts would hold that sovereign power had “come to reside” in some body different from Parliament as at present constituted, that assumes a revolution in the legal system, as is explained below.

²⁵ 4th ed., 7.

²⁶ Cf. Professor Friedmann’s remarks in 24 Australian L.J. at p. 105.

Most of the writers who have been quoted appear to realise that somewhere in the background is a rule of English law that Parliament cannot bind its successors. But as soon as an example is provided, as by *Trethowan's* case, they hasten to abandon this rule and suggest arguments for its opposite. These arguments must be tested in two ways: first, are they supported by judicial authority; secondly, can they lay claim to superior logic?

As to authority, the one and only case on which these revolutionary theories have been founded is *Trethowan's*. That case may be disposed of in a moment for anyone who believes in the distinction made by Dicey—and made also, it may be added, by the judges who decided the case—between sovereign and subordinate legislatures. The legislature of New South Wales was subject to the Colonial Laws Validity Act, 1865—an Act of the sovereign Parliament at Westminster—which provided in section 5 that legislation contrary to Imperial statute was void and that constitutional amendments must be made “in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said colony.” The Bill which, without a referendum, was designed to repeal the earlier Act which declared that it should not be repealable except after a referendum, was undoubtedly not framed in accordance with the law “for the time being in force.” It was therefore unlawful, like any other act of delegated power which exceeds its appointed limits. Thus the United Kingdom Parliament, by prescribing the conditions for the validity of legislation of the Parliament of New South Wales, could enable it to do the one thing which the superior legislature was incompetent to do, *i.e.*, to bind its successors. There is no paradox here. The sovereign Parliament's inability to bind its successors arises from exactly the same cause—continuing legal omnipotence—as the subordinate legislature's subordination. The point was very well put by Dixon J. (as he then was)²⁷:

“The difficulty of the supreme legislature lessening its own powers does not arise from the flexibility of the constitution. On the contrary, it may be said that it is precisely the point at which the flexibility of the British constitution ceases to be absolute. Because it rests upon the supremacy over the law, some changes which detract from that supremacy cannot be made by law effectively. The necessary limitations upon the flexibility of the constitution of New South Wales result from a consideration of exactly an opposite character.”

²⁷ In *Trethowan's* case, 44 C.L.R. at p. 427. See also at p. 426 for the contrast between sovereign and subordinate legislatures.

Trethowan's case is therefore nothing more than a decision on the Colonial Laws Validity Act, and the Judicial Committee also made this clear, saying ²⁸:

"The answer depends in their Lordships' view entirely upon a consideration of the meaning and effect of section 5 of the Act of 1865, read in conjunction with section 4 of the Constitution Statute, assuming that latter section still to possess some operative effect. Whatever operative effect it may still possess must, however, be governed by and be subject to such conditions as are to be found in section 5 of the Act of 1865 in regard to the particular kind of laws within the purview of that section."

Thus, at least in the opinion of the judges who decided it, Trethowan's case is simply an application of the principle of *ultra vires*, which cannot be applied to any Act of the United Kingdom Parliament.

But if the new conjectures cannot be justified from New South Wales, they may perhaps draw aid and comfort from north of the Border. *MacCormick v. Lord Advocate*,²⁹ the case in which the legality in Scotland of the royal title "Queen Elizabeth II of Great Britain" was challenged, has not yet reached the textbooks. But it is bound to do so, because an overt judicial attack was made on Dicey's views, though they were recognised as being derived from those of Coke and Blackstone. In a most interesting passage the Lord President (Cooper) takes up the question whether the United Kingdom Parliament can legislate contrary to the sacrosanct provisions of the Treaty of Union with Scotland, embodied in England in the Union with Scotland Act, 1706.³⁰ He expresses the opinion that the law of Scotland differs from that of England, and that according to the law of Scotland the legislation which gave effect to the Treaty of Union established "fundamental law" which Parliament could not alter.³¹ No authority is mentioned, however. And the Lord President proceeds at once to add that neither the courts of Scotland nor those of England have authority to question "whether a governmental act

²⁸ [1932] A.C. at p. 539.

²⁹ 1953 S.C. 396.

³⁰ See note 19, above.

³¹ Dicey himself considered this possibility, but pointed out (rightly, it is submitted) that the Parliament of Great Britain would then have been a subordinate legislature: *Law of the Constitution*, 9th ed., p. 68, note 1. Lord President Cooper's opinion has perhaps something in common with the statement of Lord Mansfield (also possibly inspired by Scottish principles) that the articles of a treaty of cession are "sacred and inviolable according to their true intent and meaning": *Campbell v. Hall* (1774) 1 Cowp. 204 at p. 208. But Lord Mansfield does not say how they are to be enforced.

of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent states and merged their identity in an incorporating union.”³² Since he also mentions the possibility that “nowadays there may be room for the invocation of an ‘advisory opinion’ from the International Court of Justice,”³³ it seems that the Lord President’s “fundamental law” is something quite different from the ordinary “law” which municipal courts enforce. He appears, indeed, to safeguard himself very carefully against any suggestion that the courts would hold Parliament unable to repeal the Union Act, and to concern himself rather with the political propriety of doing so.

The theory that Parliament can, under English law, lay fetters on future Parliaments is thus, as Jennings admits, unsupported by authority. Jennings however says that the orthodox view—Dicey’s view—also requires legal proof, and that apart from the dictum in *British Coal Corporation v. The King*,³⁴ “no such proof can be offered.”³⁵ But if the *Ellen Street Estates* case³⁶ is not such proof, what is? The Court of Appeal there held, as a necessary part of their decision, that “the legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation.” What more could be asked? It is not every day that the validity of Acts of Parliament is challenged in English courts, and one can hardly expect a long line of decisions. A long line of professional opinions is however easily produced. Bacon,³⁷ Coke³⁸ and Blackstone³⁹ are all in agreement, and every English judge who has touched on the point has supported the fundamental doctrine which they laid down. Why has it become the fashion, merely because of *Trethowan’s* case, to present this simple English theory of Parliamentary sovereignty as if it were full of darkness and doubt, or only some kind of bee in Dicey’s bonnet?

The explanation is probably to be found in the alluring argument so skilfully set out by Jennings. If he appears to underrate the

³² 1953 S.C. at p. 413.

³³ *Ibid.*

³⁴ Note 12, above.

³⁵ *The Law and the Constitution*, 3rd ed., p. 146.

³⁶ Notes 7 and 10, above.

³⁷ See the passages quoted by Dicey, p. 64 note 2, and by Professor Cowen in 16 M.L.R. at p. 291 from Bacon’s *Works*, 1859 ed., Vol. VI, 159–60 and Vol. VII, 370. As to the following passage about Parliament’s alleged ability to extinguish or transfer its power, see note 69 below.

³⁸ 4 Inst. 42.

³⁹ Comm. i, 90: “Acts of Parliament derogatory from the power of subsequent parliaments bind not.” The phrase derives from Coke, 4 Inst. 42.

legal authority against his view, no one can deny the attractions of his own reasoning. The essence of his point is that legal sovereignty is a doctrine of law, and that since Parliament can change the law in any way it likes it can alter the law about itself, and the operation of its Acts, just as well as the law about anything else. The law is, he suggests, that a rule expressed to be made by Crown, Lords and Commons will be recognised by the courts, *including a rule which alters this law itself*. Parliament has often legislated about itself, and it is tempting to treat the Parliament Acts, 1911 and 1949 (as Jennings, like Keir and Lawson, does treat them) as Acts which alter the law as to the manner and form of the exercise of the sovereign legal power. Jennings indeed dislikes the term "sovereign,"⁴⁰ in its legal sense, for this very reason, since he inclines to the view that Parliament's legal power rests on a legal rule, established in the courts, that "the courts accept as law that which is made in the proper legal form." Possibly that theory is made more plausible by the fact that the same rule is found in the Colonial Laws Validity Act. But that, in view of the entirely different nature of delegated power, can be no more than an analogy. However, if the law is that the courts recognise whatever is enacted in "the proper legal form," then it seems to follow that an Act passed contrary to the requirements of some previous Act (for example, without a referendum) would not be passed "in the proper legal form" and so would not be a valid Act of Parliament. Therefore Parliament can bind its successors as to manner and form, and the "sovereignty" of future Parliaments is qualified and precarious.

It can at least be conceded that this would be a perfectly possible state of affairs. There is no absurdity in supposing that the Imperial Parliament could be subject to the same restrictions as the Parliament of New South Wales, *i.e.*, that the common law and the Colonial Laws Validity Act are similar in effect. That the supposition is contrary to all available English authority may for the moment be forgotten while its purely logical implications are explored. But, if it is to stand against the weight both of judicial decisions and of centuries of general agreement, something more is needed than an absence of absurdity. A rival theory must at least be logically stronger than the conventional theory if it is to be worth discussing. From the pride of place which Jennings gives to his own theory it is clear that he favours

⁴⁰ *The Law and the Constitution*, 3rd ed., 138-40. Jennings truly says that legal sovereignty is a lawyer's concept expressing the relations between Parliament and the courts. But his statement that it is "not sovereignty at all," because it is not the same as political sovereignty, is hard to follow.

it, although (unlike Friedmann and Keir and Lawson) he avoids any positive statement that it is really embodied in the law. Its logical strength lies in one central point which recurs throughout the argument, and may be put in three branches as follows:—

- (a) The authority of Acts of Parliament depends on the common law;
- (b) Parliament can change the common law in any way whatever;
- (c) Therefore Parliament can change the legal rules on which the authority of Acts of Parliament rests.

The only escape from this reasoning, Jennings says, is to say that any Act of Parliament which attempts to lay down a new form for legislation is void or of no effect.⁴¹ No one would willingly say that of any Act of Parliament, and certainly not of the Parliament Acts. So is not the case then a strong one?

This reasoning, however, may be answered. In the first place, there is no need for any talk of Acts of Parliament being void. According to the orthodox theory, no Act of Parliament can be void but any Act of Parliament is repealable. The fact that an Act is liable to be repealed in the future does not make it void in any sense. It is true that if, as in section 4 of the Statute of Westminster, its only provision is one which attempts to govern future Acts of Parliament, that is a legally futile provision because when it came to the test against any future Act providing the contrary it would automatically be repealed by implication. If Parliament cannot bind its successors, there must be some infirmity in Acts which attempt to do so. But it is no more than the common infirmity which is shared by all the Acts ever passed, *viz.*, the possibility of being repealed. To say that Acts must be called "void" for that reason is to create an artificial obstacle.⁴²

But that is only an outlying point. At the heart of the matter lies the question whether the rule of common law which says that the courts will enforce statutes can itself be altered by a statute. Adherents of the traditional theory, who hold that future Parliaments cannot be bound, are here compelled to answer "no." For if they answer "yes," they must yield to Jennings' reasoning.

⁴¹ *The Law and the Constitution*, 3rd ed., 145, 148.

⁴² Bacon opposed the view stated in the text and maintained, like Jennings, that such Acts were "void": see 16 M.L.R. at p. 291, note 98, where Professor Cowen notes the conflict between Bacon's opinion and Jethro Brown's. It is surely more accurate to say with Coke and Blackstone that such Acts "bind not": see note 39, above; or (in Bacon's own words) that "things that do not bind may satisfy for the time": see note 69, below.

No one would maintain that the Interpretation Act, 1889, or the Regency Act, 1937 (see note 60, below), is "void" because it contains provisions relating to the operation of future legislation. But those provisions would be bound to yield to any future Act inconsistent with them.

But to deny that Parliament can alter this particular rule of law is not so daring as it may seem at first sight; for the sacrosanctity of the rule is an inexorable corollary of Parliament's continuing sovereignty. If the one proposition is asserted, the other must be conceded. Nevertheless some further justification is called for, since there must be something peculiar about a rule of common law which can stand against a statute.

The peculiarity lies in this, that the rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends. That there are such rules, and that they are in a very special class, is explained with great clarity by Salmond⁴³:

"All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived. . . . The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. . . . It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. *No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.*"⁴⁴

Once this truth is grasped, the dilemma is solved. For if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute, as Salmond so well explains, because it is itself the source of the authority of statute.⁴⁵ This puts it into a class by itself among rules of

⁴³ *Jurisprudence*, 10th ed. (by Dr. Glanville Williams), 155. Professor Cowen in 15 M.L.R. 294 mentions this passage in connection with the present status in South Africa of the South Africa Act, 1909, but not in connection with the wider questions raised in his second article in 16 M.L.R. 273. For the similarity between Salmond's "ultimate legal principle" and Kelsen's *Grundnorm*, see J. W. Jones, *Historical Introduction to the Theory of Law*, 226.

⁴⁴ Italics supplied.

⁴⁵ The same point is made by Professor E. C. S. Wade, following Mr. R. T. E. Latham, in the 9th ed. of Dicey, p. xxxviii: "Where the purported sovereign

common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism. The rule of judicial obedience is in one sense a rule of common law, but in another sense—which applies to no other rule of common law—it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse.

✱ For the relationship between the courts of law and Parliament is first and foremost a political reality. Historical illustrations of this are plentiful. When Charles I was executed in 1649 the courts continued to enforce the Acts of the Long Parliament, the Rump, Barebones' Parliament, and the other Commonwealth legislatures. For a revolution took place, and the courts (without any authority from the *previous* sovereign legislature) spontaneously transferred their allegiance from the King in Parliament to the kingless Parliaments. In other words, the courts altered their definition of "an Act of Parliament" and recognised that the seat of sovereignty had shifted. This was a political fact from which legal consequences flowed. But in 1660 there was a counter-revolution: Charles II was restored, and it was suddenly discovered that all Acts passed by the Commonwealth Parliaments were void for want of the royal assent. The courts, again without any prior authority, shifted their allegiance back to the King in Parliament, and all the Commonwealth legislation was expunged from the statute book.⁴⁶ The "glorious revolution" of 1688 was, in its legal aspect if in no other, much like the revolution of 1649, for the courts, recognising political realities but without any *legal* justification, transferred their obedience from James II to William and Mary. Had the Jacobite rebellions of 1715 and 1745 succeeded, the courts might once again have held all intervening legislation—including the Bill of Rights and Act of Settlement—void for lack of the assent of the proper monarch.⁴⁷ The fact that William and

is anyone but a single actual person, rules are required to ascertain the will of the sovereign. They must be observed as a condition of the validity of legislation. The rules are therefore logically superior to the sovereign."

⁴⁶ Maitland, *Constitutional History*, 282. In *Heath v. Pryn* (1670) 1 Vent. 14 counsel had the hardihood to challenge an Act of the Restoration Parliament: "The plaintiff's counsel would have denied the Act of 12 Car. to be an Act of Parliament because they were not summoned by the King's writ; but the judges would not admit it to be questioned, and said, that all the judges resolved, that the Act being made by King, Lords and Commons they ought not now to pry into any defects of the circumstance of calling them together . . ."

⁴⁷ Maitland, *Constitutional History*, 284-5.

Mary's Parliament had passed Acts confirming their title to the Crown and its own legislative authority would obviously not have availed in the least.

What Salmond calls the "ultimate legal principle" is therefore a rule which is unique in being unchangeable by Parliament—it is changed by revolution, not by legislation; it lies in the keeping of the courts, and no Act of Parliament can take it from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts.⁴⁸ It is simply a political fact. If this is accepted, there is a fallacy in Jennings' argument that the law requires the courts to obey any rule enacted by the legislature, *including a rule which alters this law itself*. For this law itself is ultimate and unalterable by any legal authority.

The same point lies at the root of the distinction between sovereign and subordinate legislation, which is so prominent in Dicey's analysis but which Jennings and Friedmann naturally criticise. Subordinate legislation is one which owes its immediate legal authority not to an "ultimate legal principle" but to a superior legislature. In other words, the relations between a subordinate legislature and the courts which interpret its legislation are governed not merely by political reality but by a superior legal authority to which those courts render a more devoted obedience. The courts cannot serve two masters; if there are two or more legislatures within the same legal system, there must be one to which the courts will allow the last word in any particular matter. That is the "ultimate legal principle." The distinction between sovereign and subordinate legislation is therefore this: sovereign legislation depends for its authority on an "ultimate legal principle," *i.e.*, a political fact for which no purely legal explanation can be given; subordinate legislation depends for its authority on some ulterior *legal* power for which a legal explanation *can* be given. Analytically this is a clear distinction, and many of its results are explained by Dicey in the course of his comparison between sovereign and non-sovereign law-making bodies.⁴⁹ To say that "Dicey's comparison is, as a matter of law, entirely beside the point"⁵⁰ is to do him less than justice. It is *as a matter*

⁴⁸ The same point is well put by K. C. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., pp. 155-6.

⁴⁹ *The Law of the Constitution*, Chap. II.

⁵⁰ *The Law and the Constitution*, 3rd ed., 142. Similarly Professor Friedmann in 24 Australian L.J. at p. 104 says that the distinction is "irrelevant to

of law that the distinction is fundamental. For in the one case, that of the sovereign legislature, there is an ultimate fact which the legislature is itself powerless to change by legislation; while in the other, that of the non-sovereign legislature, the authority of its Acts can at any time be modified by the superior legislature. That is why, as a matter of law, the United Kingdom Parliament can empower the Parliament of New South Wales to do the one thing which it is itself powerless to do, to wit, bind its successors. *Trethowan's* case is a perfect illustration.

If this is correct, Dicey, and the many others who have held similar views, are on firmer ground than their critics—not only because they have the support of such judicial authority as can be collected, but also because there happens to be a rational foundation for what English lawyers have commonly believed. [All arguments seem to combine in support of the view that the United Kingdom Parliament is, in the eyes of the English courts, a continuously sovereign legislature, which cannot bind its successors as to “manner and form” or anything else; and that if a “skilful draftsman” attempted to entrench an Act of the United Kingdom Parliament by forbidding repeal except after a referendum, that Act like any other could be repealed by an ordinary Act of Crown, Lords and Commons without a referendum. To suggest the contrary is to assume a revolution, in which the courts must be taken to have abandoned their loyalty to the legislature as now constituted; but, since this is something which no legislation can bring about, it is a purely political forecast.]

Of course, revolutions can and do occur. Nor need we go back to the seventeenth century for examples, for something of the kind is undoubtedly in progress within the British Commonwealth. South Africa provides the clearest example. The one point which was agreed on all hands in *Harris v. Minister of the Interior* was that the Parliament of the Union of South Africa was a sovereign legislature. Thirty years ago it was undoubtedly a subordinate legislature, for it was subject to the Colonial Laws Validity Act just like the Legislature of New South Wales.⁵¹ During these years the seat of sovereign legal power has therefore shifted from Westminster to Pretoria. How has this come about? One naturally answers that it is the result of the Statute of Westminster, 1931, and of South Africa's own Status of the Union Act, 1934, which in section 2 declared:

this problem,” i.e., to the discussion of *Trethowan's* case. He is therefore compelled to differ from the conclusions so convincingly stated by Dixon J.: see p. 182, above.

⁵¹ *R. v. Ndobe*, 1930 A.D. 484, at 492-3.

"The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union."

But such a purely legal answer can easily be shown to be inadequate; for it does not explain what would happen if, to take Lord Sankey's example, the United Kingdom Parliament were to attempt to amend or repeal the Statute of Westminster. Most people would predict, if they were willing to consider so unlikely an event, that English judges would be bound to uphold the United Kingdom Parliament's power to repeal or amend the Statute,⁵² but that South African judges would not.⁵³ The repealing Act would thus be ineffective in South Africa, and the South African courts would have thrown off their allegiance to the United Kingdom Parliament. That means that a revolution has already taken place. Although the South African courts acknowledge and obey the Status of the Union Act, 1934, they cannot rely purely upon its legal pedigree: for that in turn is derived from the Statute of Westminster, and the Statute of Westminster in its own turn rests upon the authority of the United Kingdom Parliament—the very authority which South Africa has now repudiated. The more rational explanation is that the South African courts have followed the movement of political events, the movement summed up in the report of the Imperial Conference which declared that the United Kingdom and the Dominions were "in no way subordinate one to another in any aspect of their domestic or external affairs,"⁵⁴ and in the defiant judicial dictum that "freedom once conferred cannot be revoked."⁵⁵ The provision quoted from the Status of the Union Act may be compared to the confirmatory Act of William and Mary's Convention Parliament⁵⁶—it states a political fact which the courts also recognise. When sovereignty is relinquished in an atmosphere of harmony, the naked fact of revolution is not so easy to discern beneath its elaborate legal dress. But it must be there just the same, and South Africa must have made

⁵² See Professor E. C. S. Wade's introduction to Dicey, 9th ed., xlviii; cf. K. C. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed., 153-7, 246-7.

⁵³ See Professor Cowen in 15 M.L.R. 294, note 47.

⁵⁴ Cmd. 2768 (1926).

⁵⁵ Note 14, above.

⁵⁶ 1 Gul. & Mar. sess. 1, c. 1 (confirming Parliament's authority); 1 Gul. & Mar. sess. 2, c. 2 (the Bill of Rights, 1689, confirming the title to the Crown).

just as decisive a break with the past as England made by the execution of King Charles I and the establishment of the Commonwealth under Cromwell.

Now, the revolution having taken place, and the legal power of the United Kingdom Parliament having been cast off, the South African courts are left without any ulterior authority for Acts of the Union Parliament. They must therefore seek "ultimate legal principles" of their own—and they must invent them, for they have to fill a vacuum. They have to decide for themselves—for no legislation can direct them—what they will recognise as the proper expression of the new sovereign legal power. In this they have a perfectly free choice, for legally the question is ultimate. This could not be more clearly illustrated than by *Harris v. Minister of the Interior*, where the great question was whether the entrenched clauses of the South Africa Act, 1909 (an Act of the United Kingdom Parliament, which laid down that these clauses could be repealed or altered only by a two-thirds vote of both Houses of the South African Parliament sitting together) could be overridden by an ordinary Act of the South African Parliament passed by simple majorities of the Houses sitting separately. In deciding that they could not, the Appellate Division of the Supreme Court of South Africa gave an admirable example of an "ultimate legal principle" at work. In disregarding the manifest will of the "sovereign legislature" they made it clear that it was for them, the court, to say what a valid Act of that legislature was. And they elected to hold that the access of sovereignty to the South African Parliament had not altered the law as it stood under the old régime, when the superior force of Acts of the United Kingdom Parliament was acknowledged.

It is perhaps not surprising that the whole case was argued as if there was a right or wrong legal answer. In fact, if the foregoing argument is sound, there was no such necessary legal answer: the court had reached the ultimate boundary of the legal system, and had in substance to make a political decision. This hard fact—which a court of law is naturally loth to admit—appears between the lines of the judgments, for they are much more concerned with explaining that the government's case was not necessarily right than in explaining how the plaintiffs' case *was* necessarily right. They also have to explain away the earlier decision to the contrary in *Ndlwana v. Hofmeyr N. O.*,⁵⁷ given in 1937, where it had been held that:

⁵⁷ 1937 A.D. 229. An extract from the case is printed in Keir and Lawson, *Cases in Constitutional Law*, 3rd ed., 528. The case was in one sense

"the procedure expressed or implied in the South Africa Act is so far as courts of law are concerned at the mercy of Parliament like everything else."⁵⁸

Thus the court has at different times favoured each of the options open to it—so making manifest its freedom of action.

Two other matters which often enter into discussions of sovereignty need brief notice.

First, no difficulty arises over the Parliament Acts, 1911 and 1949, if they are classed—as it is submitted they should be classed—as creating yet a further species of delegated legislation. The sovereign legislature has always been regarded as having three component parts, and an Act to which the Lords do not assent is not an Act of the sovereign Parliament at all.⁵⁹ It requires ulterior legal authority, which of course is provided by the Parliament Acts; and the Act of 1911 contains plenty of indications that Acts passed under it without the consent of the Lords are delegated legislation⁶⁰: the threefold sovereign has delegated

the converse of *Harris v. Minister of the Interior*, since an Act of the South African legislature was unsuccessfully challenged on the ground that the "entrenched" procedure had been used, but was not applicable. In *Harris's* case the court refused to follow *Ndlwana's* case on the ground that it conflicted with *R. v. Ndobe*, 1930 A.D. 484, and that the point had not been fully argued.

⁵⁸ Stratford A.C.J. at p. 238.

⁵⁹ See *The Prince's Case* (1606) 8 Co.Rep. 1a at 20b, holding that an Act of Parliament, even though entered on the Parliament Roll, is no Act if it "be penned, that the King with the assent of the Lords, or with the assent of the Commons, for three ought to assent, *scil.* the King, the Lords and the Commons, or otherwise it is not an Act of Parliament; and by the record of the Act it is expressed which of them gave their assent, and that excludes all other intendments that any other gave their assent." This passage was cited by Centlivres C.J. in *Harris v. Minister of the Interior*, 1952 (2) S.A. at p. 469.

The conclusiveness of the Parliament Roll is a rule of evidence of limited application, as is shown by the above passage and by Professor Cowen in 16 M.L.R. 274-83. There is no reason to suppose that the Parliament Roll is conclusive as to the validity of any statute enrolled upon it. But it is conclusive as to the *fact* of such a statute having been made. Thus Centlivres C.J. said: "Had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of ss. 35 and 152 of the South Africa Act, it may be that courts of law would have been precluded from inquiring whether that statement was correct . . ." (*Harris's* case at p. 469).

⁶⁰ The indications in the Act of 1911 are: the procedural rules laid down by ss. 1 and 2, to which the sovereign legislature is not subject; the restrictions as to subject-matter in ss. 1 (Money Bills) and 2 (Bills for extending the life of Parliament beyond five years)—the latter makes the limited power of the Crown and Commons alone particularly plain; the preamble prescribed by s. 4 (1), by which any Act made by Crown and Commons alone recites that it is made "in accordance with the provisions of the Parliament Act, 1911, and by authority of the same."

The Regency Act, 1937, provides a similar example, since it provides (s. 1) that the functions of an infant sovereign shall be performed by a Regent, and limits (s. 4) the Regent's power to assent to legislation. Presumably an infant sovereign could nevertheless effectively assent to a Bill repealing or amending the Regency Act.

its power, subject to restrictions, to a new and non-sovereign body made up of two of its parts only. Difficulty only arises if the expression "Act of Parliament" is used for sovereign and non-sovereign Acts indiscriminately, for ambiguity then creeps in. Thus Jennings writes:

"The law is that Parliament may make any law in the manner and form provided by the law. That manner and form is provided, at present, either by the common law or by the Parliament Act of 1911."⁶¹

But the rule of common law is the "ultimate legal principle," whereas an Act passed under the Parliament Act has an obvious legal source behind it: it takes effect "in accordance with the provisions of the Parliament Acts, 1911 and 1949, and by authority of the same."⁶² That is the hall-mark of delegated legislation. An Act passed without the consent of the Lords is an Act of "Parliament" only in a sense which does not affect any question of sovereignty; for the "Parliament," being without the peers, enjoys no recognition as a sovereign body. It hardly seems correct to say that

"... when they (*sc.* the Parliament Acts) operate the sovereign body amounts to no more than the Crown and the Commons."⁶³

Secondly, there are a number of interrelated questions as to the composition of the sovereign body and its ability to alienate or destroy its own power. Much space could be devoted to these, but fortunately the reader can be referred to Professor Cowen's articles on the Constitutional Issues in South Africa.⁶⁴ A good example is the controversy, to which Professor Cowen refers, which was provoked by Mr. Gladstone's Home Rule Bill of 1886. In the heat of the contest over Irish independence—so different in spirit from the later emancipation of the Dominions—it is to be feared that several great constitutional lawyers slipped into unguarded remarks. In an entertaining attack on the provisions of the Bill (which was not, of course, passed into law) Anson contested the government's view that the Imperial Parliament could not divest itself of its authority by legal methods, and that any Act constituting an independent Irish legislature would be repealable.⁶⁵ The government spokesman was Bryce, then Under-Secretary of State for Foreign Affairs, who said ⁶⁶:

⁶¹ *The Law and the Constitution*, 3rd ed., 144.

⁶² See note 60, above.

⁶³ Keir and Lawson, *Cases in Constitutional Law*, 4th ed., 7.

⁶⁴ The most important passage is in 16 M.L.R. 286-98.

⁶⁵ (1886) 2 L.Q.R. 427.

⁶⁶ Quoted by Anson, *ibid.* at p. 435.

"We shall retain as a matter of right the power to legislate for Ireland for all purposes whatever, for the simple reason that we cannot divest ourselves of it. There is no principle more universally assented to than the absolute omnipotence of Parliament, because there is nothing beyond us or behind us. . . . There is one limitation and one only upon our omnipotence, and that is that we cannot bind our successors. If we pass a statute annihilating our right to legislate it may be repudiated by our successors."

Anson, whose line of attack on the Bill was that it impaired the sovereignty of the Imperial Parliament, replied ⁶⁷:

"I should be disposed to combat this proposition, which lies at the root of the whole discussion. It is said that the Imperial Parliament cannot bind its successors, that what one Parliament may enact another Parliament may repudiate. But if the Irish Government Bill had become law the Parliament of 1885 would have had no successors. It met as the Parliament of the United Kingdom of Great Britain and Ireland; if the Bill had become law, that Parliament would have ceased to exist, and the assembly sitting at Westminster would have been the Parliament of Great Britain only. A repudiation of the Acts of the Parliament of 1885 by such an assembly would not have been a repeal by one Parliament of the Acts of another Parliament similarly constituted . . ."

Anson then pursues his argument that Parliament can, by passing a suitable Act, abandon its sovereign power, and concludes ⁶⁸:

"For the statement that Parliament cannot bind its successors may be taken to be true, subject to two exceptions. The first of these is where Parliament surrenders its sovereign powers over a certain area to another person or body. It seems difficult to contend that a sovereign cannot abdicate his powers, in favour of another, so as to make him legally incapable of exercising them. . . . The second exception would be found in the case of such a transaction as was contemplated in the Bill before us, where two portions of a people heretofore represented in a common Parliament agree to have separate legislative assemblies."

Dicey, whose views were similar to Anson's, also said:

⁶⁷ *Ibid.* at p. 436.

⁶⁸ *Ibid.* at p. 440.

"No principle of jurisprudence is more certain than that sovereignty implies the power of abdication. . . ." ⁶⁹

It will at once be seen how this controversy contains exactly the same elements as the question whether the Statute of Westminster is repealable by the United Kingdom Parliament. It is Bryce who puts forward the strictly legal view, corresponding with Lord Sankey's dictum in *British Coal Corporation v. The King*. It is Anson and Dicey who are saying "Freedom once conferred cannot be revoked." What neither side quite acknowledges is that the seat of sovereign power is not to be discovered by looking at Acts of any Parliament but by looking at the courts and discovering to whom they give their obedience. In the case of peaceful ~~revolutions~~, as has been pointed out, the issue is obscured by legal camouflage: Acts of Parliament purport to transfer sovereign power and since sovereign power passes at the same time by universal consent, the transfer is ascribed to the Acts. But it has already been seen that this is a defective explanation, for it leaves alive the controversy about the possibility of repeal. That controversy can be resolved only in one way, by recognising that sovereignty is a political fact for which no purely legal authority can be constituted even though an Act of Parliament is passed for that very purpose. Thus to say that a sovereign can abdicate by a legal act is fallacious, even though it be added that "no principle of jurisprudence is more certain." Bryce and Lord Sankey are on safer ground, provided we always add Lord Sankey's wise words: "but that is theory and has no relation to realities." For it is reality that counts: if the courts of the newly made independent country have in fact thrown off their allegiance, it is futile to talk of continuing legal sovereignty. There has been a revolution.

Similar comments apply to the question of changes in the

⁶⁹ *England's Case Against Home Rule*, 244-5. For a similar statement of Dicey's views see *The Law of the Constitution*, 9th ed., 68-9, where there is the same dogmatism but the same absence of convincing reasons. How Dicey reconciled his assertions that Parliament could destroy or transfer its sovereignty with the proposition that it could not bind future parliaments is nowhere explained.

But Bacon was of the same opinion, saying "It is in the power of Parliament to extinguish or transfer their own authority, but not, whilst the authority remains entire, to restrain the functions and exercises of the same authority" (*Works*, 1859 ed., Vol. VII, 370-1; quoted by Professor Cowen). To this one can best reply in Bacon's own words, that "things which do not bind may satisfy for the time" (*ibid.*, Vol. VI, 160); for no act of extinction or transfer would be proof against repeal if the courts remained faithful in their obedience to the legislature. Bacon, Anson and Dicey are assuming that the act of extinction or transfer is accompanied by a political revolution which permanently alters the allegiance of the courts.

composition of the legislature. The crucial question is simply one of fact, will the courts recognise the new legislature or not? There is no reason why the withdrawal of Irish members should have any greater effect on the authority of Parliament than did the exclusion of the bishops from the House of Lords from 1642 to 1661.⁷⁰ To suggest that in such cases Parliament has no proper successors is contrary to plain facts. A point might come where the courts would be compelled to ask whether Parliament had not altered out of all recognition—but that would be an extraordinary situation, and what the attitude of the courts would be, being a political fact, is quite unpredictable.⁷¹

Professor Cowen perceives that questions like these cannot well be answered:

“In the present state of the authorities, it is submitted that one cannot prudently give a clear-cut answer; for this is where the fields of law and logic, politics and history meet and overlap; where the boundaries are fluid, elusive and obscure.”⁷²

But to a lawyer the boundaries of the law need not be obscure, and his conscience may be easy if, by observing them, he avoids attempting to give legal answers to political questions.

⁷⁰ Maitland, *Constitutional History*, 288.

⁷¹ Cf. G. Marshall, “What is Parliament? The Changing Concept of Parliamentary Sovereignty,” *Political Studies*, Vol. II, 193. Mr. Marshall seems to favour a doctrine which would allow changes in the composition of the sovereign body to be made by Acts of Parliament which could (presumably) be “entrenched,” a view similar to that of Keir and Lawson, note 25 above.

⁷² 16 M.L.R. at 297.

THE DUTY PROBLEM IN NEGLIGENCE

R. W. M. DIAS

TEXTBOOKS on tort begin with the trite proposition that the commission of a tort requires a duty, breach of that duty and, generally, damage. In the tort of negligence, we are told, the duty is a duty of care. The usual way in which this is formulated is that if you can foresee that your conduct is likely to affect a given person, there arises the duty to take care that your conduct does not injure him. The idea seems to be taking root in Roman-Dutch law as well, which is remarkable in view of its Civil law origin. A good deal of controversy has arisen as to whether the notion of the duty of care is necessary or not. It is here suggested that the differences of opinion are reconcilable, but in order to do that we must examine the place which the duty of care occupies in negligence, both in English law and in Roman-Dutch law, since much comment on English law has been forthcoming from the latter quarter and comparison will be instructive. The basis of the proposed reconciliation is that the duty of care is a hybrid notion, combining a question of law and of fact, a dichotomy which is apparent in the language of judges and writers. Those who seek to defend its utility seem mindful of the element of law in it, while those who attack it are thinking of the element of fact. In order to elucidate these elements it is necessary to analyse the tort of negligence. This article will be confined to the examination of the legal element. It will be helpful to begin by appreciating what is meant by the "tort of negligence."

THE TORT OF NEGLIGENCE

It is fashionable nowadays to say that there is a separate tort of negligence: indeed, the courts themselves have said so.¹ That, however, is not necessarily final. Any doubts that may be entertained can only be dispelled by showing what this tort is. The matter has been disputed: Salmond and his supporters denied that negligence was a tort in itself, but that it was only a method of committing certain other torts; Pollock and Winfield and their

¹ *Donoghue v. Stevenson* [1932] A.C. 562, especially the speech of Lord Atkin, *Lochgelly Iron, etc., Co., Ltd. v. M'Mullan* [1934] A.C. 1, 25; *Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85, 101, 103; *Nicholls v. Ely Beet Sugar Factory, Ltd.* [1936] Ch. 343, 351.

supporters have said that it is a tort in itself in addition to being a method of committing certain torts. Most present-day writers incline towards the latter view.² None of those who assert that it is a tort explain what it is. As a tort it is said to be of recent origin, but no precise date can be given to its birth.³

On all this it should be noted, in the first place, that the question is devoid of practical effect. The conduct of an action in court for careless injury does not depend on whether negligence is or is not a tort. Secondly, the logical approach to the question whether negligence is a separate tort or not would be to ask whether there is any characteristic of "separate tortiousness" (if such a word may be coined). Looking around at the other torts there seems to be no discoverable common characteristic. The law of tort developed piecemeal and during its last hundred years under the influence of the doctrine of *stare decisis*. It is generally thought that the old action of trespass lay for direct physical interference only. The area of liability was narrow, but it was then widened by actions on the case covering new kinds of harm and new methods of inflicting harm. To the old lawyers the essential question was, what kind of action lies in this situation? in which was implicit the question, does the law recognise this harm and the manner of its infliction? The different torts known at the present time are only labels that came to be attached to these developments, either by usage or accidents of history, for the purpose of statement rather than procedure. If, then, the separation of torts is only the result of classification, the same would seem to be true of negligence. The recognition of carelessness as a mode of inflicting harm has been variously traced by legal historians.⁴ When a sufficiently large volume of case-law has accumulated dealing with the careless infliction of harm, it is possible to draw a ring round them on paper, extract principles according to which remedies have been granted and refused, and then say that this is the "tort of negligence."

Thirdly, even while the forms of action still flourished it would not have been true to say that the recognition of carelessness necessarily widened the area of liability. The importation of carelessness into trespass restricted rather than widened liability, since

² Salmond on *Torts*, 11th ed., 36; Pollock, *Law of Torts*, 15th ed., Excursus D, 326; Winfield, 42 L.Q.R. 184; Charlesworth, *Negligence*, 8; Clerk & Lindsell, *Torts*, 11th ed., 344; Paton, 23 Austr.L.J. 158; Payne, 6 *Current Legal Problems*, 236.

³ Winfield, *op. cit.*, also *Tort*, 6th ed., 477, says that it was a process, which was complete in "almost our own generation"; yet Payne, *op. cit.*, 238, says it became a tort in 1932, Paton, *op. cit.*, 159, says it occurred in 1934.

⁴ Winfield, 42 L.Q.R. 184; Plucknett, *A Concise History of the Common Law*, 4th ed., 435; Fifoot, *History and Sources of the Common Law*, 154; Milsom (1954) Camb.L.J. 105.

trespass was originally strict. It is in the sphere of actions on the case that the recognition of harm carelessly inflicted may be said to have widened liability. The emergence of negligence as a separate tort, however, is a modern development which is said to have taken place after the forms of action passed away. At the present day the law recognises a certain area of harm, which is wide as regards physical injury to the person and to property and far less wide as regards non-physical and purely pecuniary loss.⁵ Harm inflicted carelessly, which is actionable, is also actionable under the title of some other tort if inflicted intentionally. Thus, if injury to the person is inflicted carelessly it is said to fall under negligence or trespass, but if it is inflicted intentionally it is said to fall under battery. The converse is not true: not all harm, which is actionable when inflicted intentionally, is actionable if inflicted carelessly. Thus, an intentional false statement which inflicts financial loss amounts to deceit, but a careless false statement inflicting similar loss involves no liability.⁶ Accordingly, the question that has been asked is this: is there anything to be gained by erecting negligence into a tort? Winfield's answer was that "the assertion that every act which is a tort if committed negligently, will be equally a tort if committed intentionally, leaves out of account all cases of omission."⁷ This, it is respectfully submitted, is scarcely an answer, for it confuses "negligence" with "neglect," i.e., omission. One can intentionally neglect to do something. All instances when careless omission will be actionable will undoubtedly be actionable if the omission is intentional. Perhaps the question may be countered by asking a question in return: was anything gained by making battery into a tort? Furthermore, it may be argued that the tort of negligence will enable the expansion of the existing area of liability for carelessness so as to make it coterminous with the area of liability for intentional conduct. It could scarcely go further, for it would be grotesque

⁵ No liability for non-physical harm, e.g., *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453; *Correlli v. Wall* (1906) 22 T.L.R. 532, 533; *La Société Anonyme de Remorquage à Hélice v. Bennetts* [1911] 1 K.B. 243; *Sports, Ltd. v. Our Dogs Publishing Co.* [1916] 2 K.B. 880; *Hunt v. Damon* (1930) 46 T.L.R. 579; *Candler v. Crane* [1951] 2 K.B. 164, 189; *Best v. Fox* [1952] A.C. 716, also [1950] 2 All E.R. at 800-1; *Abbott v. Sullivan* [1952] 1 K.B. 189, 216; *Perera v. Vandiyar* [1953] 1 W.L.R. 672.

⁶ Other examples, intentional injury to trespassers, intentional interference with contract. Prosser, 52 Michigan L.R. 10: "A contract interest is not entitled to protection against mere negligence"; Charlesworth, *Negligence*, 14-17; Salmond on *Torts*, 501; Buckland & McNair, *Roman Law and the Common Law*, 2nd ed., Excursus, 368; Marsh, 69 L.Q.R. 183-4. In *Corbett v. Burge, Warren & Ridgley, Ltd.* (1932) 48 T.L.R. 626 it was stated that liability for harm of the type inflicted in the case required malice, negligence being insufficient.

⁷ 42 L.Q.R. 196, n. 2.

to suggest that there could be liability for an act done carelessly, but not intentionally. The argument may be illustrated as follows. It has been decided that a careless false statement, which inflicts financial loss, is not actionable under the tort of deceit, but it might now be made actionable under the tort of negligence instead in much the same way as intentional injury to the person falls under battery and careless injury under negligence or trespass. It must be emphasised, however, that the courts have not yet done so.⁸ As the law stands at present, the area of carelessly inflicted harm that is remediable is less in extent than that of intentionally inflicted harm for which a remedy would lie.

Finally, there is the well-known question, if negligence is a tort, why is intention not a tort? No satisfactory answer can be given apart from saying that some forms of intentional harm have already been given specific names, *e.g.*, assault, battery, deceit, etc. This only underlines the fact that the classification into torts is not based on any characteristic of "tortiousness," but has been prompted by convenience and, above all, habits of speech. One may ask whether a development, similar to negligence, may not take place with nervous shock. This was first recognised as a kind of physical injury to the person and was originally admitted, be it noted, when caused intentionally and later carelessly.⁹ When more cases come before the courts, if not now, it may be possible to draw a ring round cases of nervous shock, inflicted both intentionally and carelessly, extract principles on which remedies are granted and refused and then say that there is a "tort of nervous shock."¹⁰

⁸ The House of Lords has laid it down that there is no liability in deceit for careless false statements resulting in pecuniary harm: *Derry v. Peek* (1889) 14 App.Cas. 337; and the Court of Appeal has decided that there is none in negligence either: *Candler v. Crane* [1951] 2 K.B. 164. It is not clear whether or not there is liability for proprietary or personal injury so caused. *Australian Steam Shipping Co., Ltd. v. Devitt* (1917) 33 T.L.R. 178, and *Humphrey v. Bowers* (1929) 45 T.L.R. 297, refused a remedy for proprietary harm, but both are pre-1932 cases based on the fallacy that contractual privity restricts liability in tort, which was exploded in *Donoghue v. Stevenson* [1932] A.C. 562. *Sharp v. Avoxy* [1938] 4 All E.R. 85, suggests that there might be liability for personal injury, while *Old Gate Estates, Ltd. v. Toplis* [1939] 3 All E.R. 209, suggests that such an action should be limited to personal injury, but Asquith L.J. in *Candler's* case at p. 189 was prepared to include proprietary harm. In the *Pass of Ballater* [1942] P. 112, an independent contractor made the careless misstatement, which resulted in property damage, and the employer was held liable but on a different point.

⁹ *Wilkinson v. Downton* [1897] 2 Q.B. 57; *Jannier v. Sweeney* [1919] 2 K.B. 316. Carelessness came later, *Dulieu v. White* [1901] 2 K.B. 669; *Hambrook v. Stokes* [1925] 1 K.B. 141, 158, where Atkin L.J. treats shock as a kind of personal injury; *Bourhill v. Young* [1943] A.C. 92.

¹⁰ Winfield doubted whether there is such a tort: Winfield on *Tort*, 92; the *American Restatement of Torts*, Vol. 1, s. 17, regards it as a species of bodily harm only. Bohlen traces its recognition: *Studies in the Law of Tort*, 252. Goodhart regards it as a tort, but he gives no explanation: 16 M.L.R. 22; Denning L.J. in *King v. Phillips* [1953] 1 Q.B. 429, 440-2, refused to regard it as a separate tort. The words of Street may well be applied to

The result of this discussion is that the development of negligence depends on the readiness on the part of the law to grant remedies for the careless infliction of certain kinds of harm, by no means all harm, nor even all kinds of harm recognised by law. Since it is so often stated that the "duty of care" is something peculiar to the tort of negligence, it is well to bear in mind the nature of this tort when embarking upon an investigation into the nature of that duty.

THE ELEMENT OF LAW IN NEGLIGENCE

Jurisprudentially a duty is a notional pattern of conduct. It may involve either the idea of behaviour alone: "you ought to, or ought not to, behave in a certain way" (e.g., the primary duty under a contract); or it may involve the idea of behaviour in relation to consequences, e.g., as in tort, "you ought not to cause damage." Stated in this way without qualification, it would suggest that there is a general duty not to cause damage of any kind, that there is, in effect, a general principle of liability. We are here on the fringe of another well-known dispute, which has been thoroughly explored elsewhere.¹¹

On the nature of duty in tort three points have to be borne in mind. (1) From what has been said previously, at any given time the harm must be of a kind recognised by law, the kinds being, broadly, physical (personal and proprietary) and non-physical, including pecuniary. It has also been pointed out that the law recognises physical damage to a greater degree than non-physical. This means that there is no general duty not to cause harm, but a limited duty, or set of duties, not to cause certain types of harm. (2) The manner in which the harm is caused must also be recognised. Thus, in general there is no duty not to cause harm by omission,¹² by the sale or leasing of ruinous premises,¹³ by trade competition,¹⁴ by animals straying on the highway.¹⁵ Some duties are limited to

the point suggested above: "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognised as parasitic will, forsooth, tomorrow be recognised as an independent basis of liability": *The Foundations of Legal Liability* (1906) 470.

¹¹ Principal protagonists: Winfield, 27 Col.L.R. 1 (reprinted in *Select Legal Essays*, 3); Salmond, *Torts*, 15; Pollock, *Torts*, 16. For a review of the controversy and a list of other writers, see Glanville Williams, 7 Camb.L.J. 111. See also Prosser, *Torts*, 4; Lloyd, 29 Can.B.R. 210.

¹² On this topic, see Wright, 19 Can.B.R. 465.

¹³ *Cavalier v. Pope* [1906] A.C. 428; *Bottomley v. Bannister* [1932] 1 K.B. 458; *Otto v. Bolton* [1936] 2 K.B. 46; *Travers v. Gloucester Corporation* [1947] 1 K.B. 71.

¹⁴ *Mogul Steamship Co. v. McGregor, Gow & Co., Ltd.* (1889) 23 Q.B.D. 598.

¹⁵ *Searle v. Wallbank* [1947] A.C. 341.

causing harm maliciously.¹⁶ Some are limited to intentional conduct, as already pointed out, while a large number cover careless conduct as well. (3) Finally, a minor point not sufficiently appreciated is that the person injured must himself be recognised, either generally or in relation to a particular mode of inflicting harm. Examples of persons not so recognised would be the Queen's enemies, e.g., paratroopers, and (in the past) outlaws. Examples of persons not so recognised for the purposes of some particular harm are trespassers, as regards some types of unintentional injuries, licensees as regards injuries sustained otherwise than through "traps": likewise, a statutory duty is commonly owed to some persons and not to others.¹⁷

Winfield, who favoured the general principle of liability, argued that these cases of non-recognition are cases of justification. That depends on the meaning of "justification," and it can, of course, be reduced to a matter of words. Where the harm is not recognised we can, of course, say that the defendant is "justified" in inflicting it, but quite apart from the artificiality of such an argument, there may be an answer to it. If Winfield is correct, then once the plaintiff proves harm of any kind, it will cast the burden on the defendant to justify it. If, however, there is no general principle and the harm falls outside the recognised orbit, the defendant's submission will be that there is no case. The practice of the courts accords with the latter, so it would seem that Winfield's assertion is untenable on any interpretation.

At any given time, therefore, there is a recognised area of harm outside which there is no liability, however one describes it. Now, all that "recognised by law" means is that the courts have shown willingness to give a remedy. Since the matter rests with them, they can always extend the existing area or refuse to do so. Dr. Glanville Williams has pointed out that this has not been sufficiently appreciated: the dispute is not whether the courts have extended the area or not, but why they have sometimes done so and sometimes refused. The reason, as he pointed out, depends not on the presence or absence of a general principle, but on extra-legal considerations.¹⁸ However that may be, the fact remains that the patterns of conduct constituting "duty" in tort are conditioned

¹⁶ e.g., injurious falsehood, malicious prosecution, malicious issue of civil process.

¹⁷ *Knapp v. Railway Executive* [1949] 2 All E.R. 508.

¹⁸ 7 Camb.L.J. 113-4. Examples of case-law, *Cattle v. Stockton Water-works Co.* (1875) L.R. 10 Q.B. 453, 458; *Shaw Savill and Albion Co., Ltd. v. Commonwealth* (1940) 66 C.L.R. 344 (Australian). Extra-legal reasons call for the exercise of value judgments: Winfield on *Tort*, 480, n. (m); Stone, *Province and Function of Law*, 166; Morison, 11 M.L.R. 23. The latter in effect affirms what Dr. Williams had said previously: the extension or refusal to extend the area of "duty situations" involves a "creative choice" on the part of the court.

by the recognition of the harm, the manner of its infliction and the person injured. In general terms, therefore, "duty" in tort may be described as notional patterns of conduct not to inflict recognised types of harm in recognised ways on recognised categories of persons. The formulation of "duty" in negligence would then be notional patterns of conduct not to inflict recognised types of harm carelessly on recognised categories of persons.¹⁹ So stated, the duty, the core of which is recognition by law, is indispensable. Winfield, who objected to the duty of care, gave it as one of his reasons that if one assumes the existence of a general principle of liability the idea of duty is unnecessary. The short answer would be that since the assumption is untrue the objection fails. Even if it is true, that does not dispense with the *idea* of duty as a notional pattern of conduct not to cause harm. It may become less important, but that is a different matter.

The vital question now is: *how does one know if the harm, the careless infliction of it and the person are recognised by law?* The answer is simple. *By knowing the law.* That is why "duty" is always said to be a question of law for the judge.

So far this has been an analysis of "duty" rather than "duty of care," which is usually formulated: if you can foresee harm to a person as likely to result from your conduct, you are under a duty to take care. The disputes as to this duty are due to confusion arising from two directions. (1) Two ideas are combined in the duty of care. (a) There is the element of law that the harm, its careless infliction and the person injured must be recognised by law. This element exists notionally all the time. The phrase duty of care is sometimes used solely to denote this. Lord Wright said in *Grant v. Australian Knitting Mills, Ltd.*²⁰ "The mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists." (b) The reference to foreseeability in the formulation of the duty of care brings into it an element of fact, since foreseeability refers to conduct in a given situation. It

¹⁹ Buckland, 51 L.Q.R. 637; *Some Reflections on Jurisprudence*, 110, saw clearly that the tort of negligence consisted of *damage* carelessly inflicted. He says: "Is not the rational rule that . . . there is a duty to everyone not to damage him by carelessness?": 51 L.Q.R. 649. He had said earlier: "It is more rational to say that there is always a duty not to harm people by negligence": *ibid.* 641. This way of putting it recognises the vital point that a duty is an abstract proposition of law. Its defect is that it is too widely stated. Had he said that there is a duty to certain categories of persons not to inflict certain types of damage carelessly, it would have been complete.

²⁰ [1936] A.C. 85, 103.

makes the formulation of duty of care equally applicable as a test of breach of duty (or of remoteness, according to some). Hence many passages using duty of care in this sense may best be quoted as illustrations of breach. (2) The second source of confusion lies in the different ways in which breach of duty can be conceived, whether as conduct alone, or as conduct plus a given result, and also whether foreseeability is a matter of breach or of remoteness. All this obscures the nature of breach and this reacts on the duty of care the formulation of which could also be used, with minor modifications, as a formulation of breach.

Up to now we have been considering the element of law involved in the duty of care, and let us label it the "notional duty." The remainder of this article will be devoted to a consideration of the same point in the civil law. The Roman-Dutch law of delict has now arrived at a wider area of liability than English law, but it has not found it needful to discover a separate delict of negligence. Its twin foundations are the *actio legis Aquiliae* and the *actio injuriarum* of Roman law. It is with the former that we are most concerned, for the latter deals with intentional conduct in contempt of personality. In order to understand the state to which the Roman-Dutch law has developed it is necessary to go back to the Roman law.

There was no general principle of damage in the XII Tables (about 450 B.C.), there was only a list of wrongs.²¹ The next important development known to us came with the famous *Lex Aquilia* (conjectural date 286 B.C.) which, we are told, superseded or modified the earlier law (*derogavit* ²²), although some of the items of damage in the XII Tables lasted throughout Roman law.

The *Lex Aquilia* was not a general enactment by any means, for it was restricted as to the harm, the modes of infliction and the objects injured. As to harm, the first chapter of the *Lex* dealt with the killing (*occidere*) of slaves and *pecudes* (four-footed animals

²¹ The suggestion that Fragment 8.4, "si injuriam faxit" laid down a general principle is not viewed seriously, nor the suggestion based on Festus, 265, 322. The categories of harm seem to have been: fire, *D.* 47.9.9; Cicero, *De Leg.* 2.24.61: witchcraft, Seneca, *Qu. Nat.* 4.7.4; Pliny, *Nat. Hist.* 18.6.41; 28.2.17: depasturing crops, *D.* 19.5.14.3; Pliny, *op. cit.*, 18.3.12: cutting corn, Pauli Sent. 2.31.24: cutting trees, *D.* 47.7.1; 47.7.11; Pliny, *op. cit.*, 17.1.7: injury to human beings, Gellius, 20.1.14; *Collatio*, 2.5.5: overhanging trees, *D.* 43.27.1.8; 43.27.2: discharge of water, *D.* 39.3.22.2; 40.7.21 *pr*: collapse of buildings, perhaps an early form of *damnum infectum*: damage by animals, *D.* 9.1.1 *pr*; *Inst.* 4.9 *pr*: damage by slaves, *D.* 9.4.21; Gaius, 4.76.

²² Lawson, *Negligence in the Civil Law*, translates it as partially repealed and *D.* 50.16.102 is to the same effect. But it is questionable whether the XII Tables could be repealed by normal constitutional machinery: Buckland, *Main Institutions of Roman Private Law*, 3. Professor P. W. Duff kindly pointed out to me that *D.* 50.16.102 does not refer specifically to the XII Tables.

that graze in herds), and the third chapter dealt with damage to the above short of killing, as well as damage or destruction of all other forms of property.²³ The methods of inflicting harm, too, were limited. As in the English action of trespass the injury had to be inflicted directly, by the body to the body, *corpore corpori*, but the Aquilian may have been narrower than even this. *D. 9.2.7.1* shows that originally death had to be inflicted manually, or at least with a weapon held in the hand, and if we accept *occidere* literally as meaning "cutting down" it was very narrow indeed. The methods specified in the third chapter were burning and breaking (*usserit, fregerit, ruperit*). These words look like explanatory glosses, but in *D. 9.2.27.16* Celsus is quoted as saying that they were in the *Lex*. Damage by omission was not covered at all. Finally, the action under the *Lex* lay only for damage to property, not to free persons, and it was available only to the owner at civil law, the *dominus* or "*erus*" as explained in *D. 9.2.11.6*. Within this field it is possible that liability was strict: all that the first chapter stated was that the killing had to be "*injuria*," without a specific defence.²⁴

From these narrow beginnings the area of liability expanded. The agencies in the development were the jurists, who widened the scope of the civil law action by interpretation, and the praetors, who gave new *actiones utiles* and *in factum*.

The extension of the notion of harm may be considered first. *Damnum* in Roman law may have meant injury to the object or loss to the owner. It was more probably the latter, but for the purposes of this article it is not necessary to decide which was the correct meaning.²⁵ Three developments are discernible. The first concerns the physical property damaged. The category of *pecus* was enlarged. *D. 9.2.2.2* shows that after some doubt pigs were included and suggests that elephants and camels should also be included. Professor Daube has suggested that the third chapter originally dealt only with the wounding of slaves and *pecudes*, not

²³ *D. 9.2.2 pr; 9.2.27.5.*

²⁴ This is suggested by the absence of *dolus* and *culpa* (intention and negligence) in the first and third chapters, the fact that the penalties were the same for injuries inflicted either way and the fact that liability in primitive law is generally strict. Liability was strict under the XII Tables as regards injury to the person (Cicero, *Pro. Tull.* 21. 51) and certain other cases as well. I am indebted to Mr. J. W. C. Turner for an interesting suggestion. In *D. 9.2.45.3* B attacks A and A throws a stone at him, misses and hits a passing slave. Had he struck B, self-defence would have justified the act as B was attacking him. The text says that A is liable for striking the slave. Self-defence cannot apply as against the slave, who was not attacking A. Mr. Turner's suggestion is that since apparently inevitable accident was no defence either, outside the limited scope of the recognised defences liability seems to have been strict.

²⁵ Daube, 7 *Camb.L.J.* 40; *Studi Solazzi*, 93, says it meant loss.

other property, but Professor Jolowicz had previously taken the opposite view that it dealt only with the complete destruction of inanimate property, not livestock or even partial damage to inanimate things.²⁶ On either view, the inclusion of all forms of property and injuries under it represents an extension. Another development was the inclusion of land, for it is clear that the original *Lex* only contemplated movables.²⁷ Secondly, the praetor extended liability by means of *actiones utiles* where the injury was to free persons.²⁸ This was a significant development, for it meant that liability was no longer confined to property damage. It is probable that the extension was made in respect of careless injuries, since the *actio injuriarum* would have been adequate had they been intentional. Thirdly, some obscurity surrounds the question how far non-physical or purely pecuniary loss was brought in. Professor Lawson has pointed out the importance of the distinction.²⁹ A suggestion based on Justinian's *Institutes*, 4.3.16, is that the action under the *Lex* lay where physical injury was inflicted directly, *corpore corpori*; that an *actio utilis* lay where it was inflicted indirectly, *corpori* but not *corpore*; and that an *actio in factum* lay where no injury was done *corpori* or *corpore*, but the loss was non-physical or pecuniary. Gaius in his *Institutes*, 3.219, said only that the action under the *Lex* lay where the harm was direct, *corpore*, and that an *actio utilis* lay where it was not. As to this it should be noted, (a) it may be that by Justinian's day the *actio in factum* had come to lie where the loss was inflicted carelessly and the *actio doli* for wilfulness. The *actio doli* never lay if there was any other remedy available and it continued to exist throughout Roman law. (b) Justinian's neat demarcation of the scope of the *actio utilis* and *actio in factum* does not represent classical law. Procedure had changed fundamentally in his day and he only retained the terminology.³⁰ The term *actio utilis* in classical law denoted usually a praetorian extension of an existing civil action, but it could be used compendiously for all praetorian actions. So Gaius's *actio utilis* may have covered pecuniary harm, though it is unlikely in view of the lack of evidence. (c) Is it possible, then, to say that at least in Justinian's day the *actio in factum* lay as a

²⁶ Daube, 52 L.Q.R. 253; Jolowicz, 38 L.Q.R. 220. Daube's view is approved by Lawson, *Negligence in the Civil Law*, 10.

²⁷ D. 9.2.27.7-9.

²⁸ D. 9.2.13 *pr.*

²⁹ 22 Tulane L.R. 116; *Negligence in the Civil Law*, 24, and in Buckland & McNair's *Roman Law and the Common Law*, 2nd ed., 367; the distinction has also been adopted by McKerron (1951) *Ceylon Law Students' Review*, 8, reprinted 69 S.A.L.J. 189.

³⁰ Buckland, *Textbook*, 2nd ed., 589, says there was no discoverable principle.

general remedy for pecuniary harm? Professor Lawson thinks not, but Professor Price believes that it did.³¹

Turning next to the extension of the modes of inflicting damage, we should observe, first, the extension of the idea of killing. The scope of *occisio* in the first chapter was widened by juristic interpretation to cover all forms of direct killing, not only with weapons held in the hand, but also, *e.g.*, by missiles, dropping things, pushing, and generally any direct means whatsoever, *qualiter qualiter*.³² Indirect killing, on the other hand, distinguished as *necare*, was remedied by praetorian *actiones in factum*.³³ Then again, juristic interpretation made the third chapter cover all direct acts whereby the thing was ruined: Gaius in his *Institutes*, 3.217, and D. 9.2.27.13 say that *ruperit* was construed as meaning *corruperit*. Here, too, praetorian actions were granted for indirect damage.³⁴ Another point is whether the Romans brought under damage *corpori* but not *corpore* the case of physical damage sustained through careless words. The classification based on Justinian's *Institutes* suggests that an *actio utilis* would have lain, but the Roman lawyers do not appear to have faced the point. The extension of liability to cases of omission is likewise vague. D. 7.1.13.2 shows that there was no general liability for omissions. D. 9.2.8 *pr* gives the case of a surgeon, who, having operated, omitted proper after-care and was held liable. This is best regarded as the bad performance of the active duty of looking after the patient. The difficult case is D. 9.2.27.9: one person lawfully lit a fire, another person acted as watcher, but fell asleep and the fire spread and burnt down a neighbouring villa. The action under the *Lex* could not lie against the first person, who did nothing unlawful, nor against the second person, who did nothing at all. We are told that a praetorian action was given against the latter. The same text is to be found in the *Collatio*, 12.7.7, and a comparison of the two indicates abridgment in the *Digest*. In the *Collatio* the liability of the watcher is paralleled to that of the surgeon who operates and neglects after care, but this vital analogy is omitted in the *Digest*.

³¹ Lawson, *Negligence in the Civil Law*, 26; Price, 66 S.A.L.J. 176.

³² D. 9.2.7.1; 9.2.7.2; 9.2.7.7; 9.2.9.1; 9.2.9.4.

³³ D. 9.2.7.6; 9.2.9 *pr*; 9.2.9.2; 9.2.9.3; 9.2.11.1. D. 9.2.7.3 looks as if it should be the extended direct action, not *in factum*. Perhaps in Proculus's time the extension of the notion of direct killing may not have covered a case like this, hence the praetor gave an *actio in factum*.

³⁴ Direct damage (by extending *rumpere*), D. 9.2.27.15; 9.2.27.18; 9.2.27.19; 9.2.27.20. Indirect damage, D. 9.2.27.21 (Mr. Turner suggests that the *actio in factum* may be a survival from a period before the extension of *rumpere* covered a case like this); 9.2.27.35; 9.2.53; 41.1.55. Note that the actions given are *in factum*, though Justinian said, *Inst.* 4.3.16, that where the damage was *corpori* but not *corpore* the *actio* was *utilis*. This shows that his classification does not reflect classical terminology.

The *Collatio* says that an action should be given "*tam in eum qui ad fornacem obdormivit, vel neglegenter custodit, quam in medicum qui neglegenter curavit.*" The "*vel neglegenter custodit*" brings out the point: an action lies against the man who fell asleep, or in other words ("*vel*") performed carelessly the active duty of guarding the fire ("*neglegenter custodit*").³⁵

Finally, the extension of liability towards non-owners must be noticed. A man did not own his body and the praetorian action, modelled on the Aquilian, for injury to a free person has already been mentioned. This amounted to the recognition of the careless infliction of injury on a free man, a new category of harm, in effect, and it has been dealt with as such. Even in the sphere of proprietary damage, certain persons, who, though not owners, had certain real rights in the property, were given praetorian actions in respect of their *interesse* in addition to the action under *Lex* available to the owner. The possessor in good faith, the usufructuary and pledge-creditor were obvious cases.³⁶ The granting of praetorian actions to foreigners, who, not being Roman citizens, could not avail themselves of the civil action, does not concern us.³⁷

Summing up, it is possible to say that the area of liability for blameworthy conduct inflicting physical damage was very wide, liability for omissions seems to have been limited, while liability for non-physical damage was undefined. However possible it may have been for such liability to have been general in the time of Justinian there is no evidence that it was so in fact.

The Roman-Dutch law took over more or less from the point at which the Roman law left off. Neither the great Dutch jurists nor the courts of modern times have found it necessary to introduce large innovations—a signal tribute to the Roman genius for principle considering that this delict dealt with one of the most active branches of the law. The Dutch extended the Aquilian action to the dependants of a deceased,³⁸ and this extension has been received into the modern law, which now enables the dependents to recover

³⁵ There is another reason for preferring the *Collatio*. In classical law the technical verb for a civil action was "*competit*," for a praetorian action, "*danda*." The *ad exemplum Aquiliae dandam actionem* in the *Collatio* is perfectly accurate, while Ulpian would hardly have said "*utilem competere actionem*" as he is made to do in the Digest, an error akin to an English lawyer speaking of prosecuting for a tort or suing for a crime. It is more likely that the compilers of the Digest, to whom these technicalities had lost all significance, slipped into the error in the course of abridgment.

³⁶ *D. 9.2.12 pr.* Note *D. 9.2.30.1*, where a third party damaged property in the hands of a pledge-creditor. The debtor is owner and the text implies that his action is civil ("*debitori actio competit*") and that of the pledgee praetorian, ("*creditori danda sit utilis*"). Up to that point the text rings genuine, but after *quaeritur* there is room for doubt.

³⁷ Gaius, 4.37.

³⁸ Voet, 9.2.11.

for non-fatal injuries as well.³⁹ The *actio doli* was superseded, since the extension of Aquilian liability to include the careless infliction of such harm as had hitherto been remedied only when inflicted intentionally by the *actio doli*, tended more and more to usurp the province of the latter. In the Roman-Dutch law the slight advantages which it held over the Aquilian action disappeared. The *actio injuriarum* remained unaffected, for it lay only where there was an element of *contumelia*. The two actions could overlap, but their respective provinces were distinct.

The question whether there is a general principle of liability, *i.e.*, a general duty not to cause harm, has thus a good deal of pertinence in Roman-Dutch law. The existence of such a principle has been judicially asserted. In *Cape Town Municipality v. Paine*⁴⁰ Innes C.J. said, "The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged." In *Perlman v. Zoutendyk*⁴¹ Watermeyer J. said, "The Roman-Dutch law approaches a new problem in the continental rather than the English way, because in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*)."⁴² There are, however, other statements to the contrary. Thus, De Villiers J.A. in *Matthews v. Young*,⁴² said, "I must point out . . . that there is no *onus* upon a defendant until the plaintiff has proved that a legal right of his has been infringed. Under the *lex Aquilia* there is only an action for *damnum injuria datum*—for pecuniary loss inflicted through a legal injury, and the defendant is not called upon to answer the plaintiff's case before the plaintiff has proved both the pecuniary loss and that it directly results from what is, in the eye of the law, an *injuria*." More recently Schreiner J.A. in *Herschel v. Mrupe*⁴³ said, "For success along the lines of deductive reasoning the plaintiff requires a major premiss to the effect that, subject to special defences like contributory negligence, an action will invariably lie where one person has suffered loss in consequence of the negligent conduct of another, who owes a duty of care to the

³⁹ *Union Government v. Warneke* [1911] A.D. 657; *Abbott v. Bergman* [1922] A.D. 53.

⁴⁰ [1923] A.D. 207, 217.

⁴¹ [1934] C.P.D. 151, 155.

⁴² [1922] A.D. 492, 507. See also McKerron, *The Law of Delict*, 4th ed., 12.

⁴³ [1954] (3) S.A. 464, 477 (A.D.).

former, whatever form that conduct may take. But, inasmuch as the law of negligence has not been authoritatively stated with reference, express or necessarily implied, to the field of spoken or written words, there is no justification for assuming such a universal proposition as the plaintiff relies upon. The general principle stated in *Paine's* case will always be an authoritative guide to the proper decision of cases in the fields to which it was intended to apply. It may be of great assistance, also, in other fields. But it must not be used, merely because verbally it is wide enough, to provide a universal major premiss from which results, possibly unsatisfactory ones, may be deduced which were not in the contemplation of those who stated the principle.”

Dicta alone are not conclusive either way. Looking at the law as it stands today, it is possible to find spheres still uncovered by the law, both as to harm and the modes of infliction. Outstanding among them is the general absence of liability for omission. The position seems to be similar to the Roman law in that liability only attaches if there has been an assumption of an active duty. This view is generally adopted by judges and writers.⁴⁴ Professor Beinart and Van den Heever prefer to state the position otherwise.⁴⁵ The former objects to any reference being made to prior conduct imposing an active duty. Development of the *culpa* idea, he says, leads to the proposition that *prima facie* there is liability for blameworthy omissions as there is for positive conduct, but the old idea of *injuria*, meaning contrary to law, which left certain areas outside legal recognition, still persists in the form of exceptions to a general principle of liability, and most omissions fall within this group. The difference between Professor Beinart's formulation and that of the others is reminiscent of the Salmond-Pollock-Winfield controversy in English law: one side denying a general principle because certain kinds of harm are outside the recognition of law, the other asserting that there is such a principle, subject to exceptions where the law does not recognise the harm. The essential point is recognition by law.

Leaving omission aside, there is no liability in respect of subterranean percolating water, unless there happens to be a servitude.⁴⁶ It is not clear whether or not the malicious interference

⁴⁴ *Halliwell v. Johannesburg Municipal Council* [1912] A.D. 590, 601, 618; *Cape Town Municipality v. Paine* [1923] A.D. 207, 217; *S.A.R. & H. v. Estate Saunders* [1931] A.D. 276, 283-5; Macintosh & Scoble, *Negligence in Delict*, 2nd ed., 2-3, 7-8; McKerron, *op. cit.*, 25-34, especially 26, n. 23 for a list of the authorities.

⁴⁵ Beinart: Review in the *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg*, Nov. 1949; Van den Heever, *Aquilian Damages in South African Law*, i, 37.

⁴⁶ *Smith v. Smith* [1914] A.D. 257.

with such water entails liability.⁴⁷ Similarly, interference with light is not a delict, unless there is a servitude.⁴⁸ In the sphere of purely pecuniary harm there is a large area of non-liability. There is no liability, for instance, for trade losses as the result of competition.⁴⁹ There is liability, however, if pecuniary loss is inflicted in certain other ways, such as injurious falsehood, inducement to break a contract and possibly certain other intentional acts.⁵⁰ The equivalent of the English tort of deceit is clearly actionable, but whether the Roman-Dutch law has gone further than this, and if so how much further, is not clear. It has been suggested that careless false statements which result in physical damage are actionable.⁵¹ Roman law did at least provide an action capable of covering such a case, whatever the precise limits of that action may have been, and there is nothing in English law precluding liability. It is also doubtful whether careless false statements, which result in purely pecuniary loss, are actionable or not. The ruling of law in *Perlman v. Zoutendyk*⁵² admits liability, although the particular plaintiff failed in the action.⁵³ The case has been criticised by Professor McKerron, who suggests that there is no liability, but Professor Price argues that there is.⁵⁴ Such being the state of the law, one can only view with regret the failure on the part of the Appellate Division in *Herschel v. Mrupe*⁵⁵ to avail themselves of the opportunity for a decisive ruling as to the law on this point. Centlivres C.J., adopting *Perlman's* case, held the defendant liable for a negligent misrepresentation, but the other four judges held that he was not liable. Unfortunately, they differed in their reasons. Schreiner J.A., after assuming cautiously "what seems, provisionally, to be reasonable, that there are cases in which such an action lies," went on to decide that there had been in fact no negligence on the defendant's part. Van den Heever J.A., disagreeing with *Perlman's* case, decided that pecuniary damage caused in this way was not cognisable at law. Hoexter J.A. held that the plaintiff had only herself to blame. Fagan J.A. also held that there had been no negligence, but he prefaced his judgment with the significant remark

⁴⁷ McKerron, *op. cit.*, 275. *Quaere* whether a public authority which increases flow is liable, although a private landowner would not be: *Johannesburg Municipality v. African Realty Trust* [1927] A.D. 163, 177.

⁴⁸ *Van den Heever v. Hanover Municipality* [1938] C.P.D. 95.

⁴⁹ *Matthews v. Young* [1922] A.D. 492, 507.

⁵⁰ McKerron, *op. cit.*, 312, 314-8.

⁵¹ McKerron, *op. cit.*, 256.

⁵² [1934] C.P.D. 157.

⁵³ *Ibid.*, 328.

⁵⁴ McKerron, *op. cit.*, 15-16, 356; 47 S.A.L.J. 359; (1951) *Ceylon Law Students' Review*, 8, reprinted 69 S.A.L.J. 189; Price, 67 S.A.L.J. 138, 257, 411; 68 S.A.L.J. 78.

⁵⁵ [1954] (3) S.A. 464.

that "the one clear deduction I find myself drawing from the decided case is that judges, who have to evaluate general theories by the acid test of factual situations, have strongly felt the necessity for limiting rather than extending the scope of liability for inaccurate statements." The Ceylon Supreme Court has also expressed its doubts. In *Chissel v. Chapman*⁵⁶ Gratiaen J. said, "If and when a case arises in our courts where damages for pecuniary loss are claimed by a person who was actually deceived by another's negligent misrepresentation, it will be necessary to decide whether *Pearlman's* case should be followed in Ceylon. I observe that it has been criticised on more than one occasion by judges and distinguished academic lawyers in South Africa . . . The present state of these South African authorities indicates that, even in an action under the Roman-Dutch law for damages instituted by someone who was actually misled by another's negligent misrepresentation, it is at least doubtful whether (and if so, to what extent) negligence by itself suffices to establish a cause of action." The learned judge adds a significant remark: "Those of us who administer the Roman-Dutch law cannot disregard its basic principles although (on grounds of public policy or expediency) we may cautiously attempt to adapt them to fresh situations arising from the complex conditions of modern society. But we are powerless to alter the basic principles themselves, or introduce by 'judicial legislation' fundamental changes in the established elements of an existing cause of action."

Finally, it should be noted that, as in English law, it is necessary that the party injured should be contemplated by the law. This is important chiefly in statutory duties.⁵⁷ Roman-Dutch law does not enter into the refinements of English law, such as intentional injuries to trespassers and the like.⁵⁸

The conclusions to be drawn from the whole of the foregoing discussion are these. Firstly, the question whether there is or is not a general principle of liability affects the manner in which "duty" is formulated. Even if there is such a principle, that does not dispense with the *notion* of duty as a pattern of conduct not to inflict harm. It will make the formulation simpler and in consequence there will be less need to emphasise it. It is submitted, however, that English law has not reached a general principle by any means, nor has Roman-Dutch law in spite of having started on a broader basis. The fact that the law recognises

⁵⁶ (1954) 56 N.L.R. 121, 124, 127.

⁵⁷ *Farmer v. Robinson Gold Mining Co.* [1917] A.D. 501; *Bellstedt v. S.A.R. & H.* [1936] C.P.D. 399; *Sand & Co., Ltd. v. S.A.R. & H.* [1948] (1) S.A. 230 (W).

⁵⁸ *Transvaal & Rhodesian Estates, Ltd. v. Golding* [1917] A.D. 18, and see generally McKerron, *op. cit.*, 278.

only some kinds of harm and modes of inflicting them and so on complicates the formulation of duty, which thereby becomes technical and important. Secondly, it is to be observed that Roman-Dutch law has not found it necessary to mark off a separate delict of negligence. The remarkable thing, however, is that the "duty of care," borrowed from English law, is taking firm root.⁵⁹ Whereas English lawyers say that the "duty of care" is an attribute of the tort of negligence, the Roman-Dutch lawyers find that the "duty of care" can exist without an analogous delict. This only confirms the conclusion which has already been drawn from the examination of the tort of negligence that this tort is only the creature of convenience and classification. The essence of it is damage carelessly inflicted. The recognition by law of the kinds of damage that may be so inflicted is indispensable. That is the idea expressed by what is here called the "notional duty."

⁵⁹ Greenberg J.A. in *S.A.R. & H. v. Marais* [1950] (4) S.A. 610, 621 (A.D.): "In my opinion the questions involved in this appeal are: (1) Does the liability of the appellant depend on whether it owed a duty of care to the deceased or his dependants? (2) If it does, was there any such duty of care? I do not propose to enter upon a discussion, from an academical point of view, whether the doctrine that liability in cases of negligence depends on a duty of care owed to the person injured should be a part of English and our law, as in my opinion the question whether it is a part of our law has been answered by judgments in this court."

CONSOLIDATION AS A ROOT OF TITLE IN INTERNATIONAL LAW

D. H. N. JOHNSON *

ALTHOUGH the rules of international law relating to the acquisition of title to territory have long been substantially clearer than most rules of international law, this clarity has to some extent been obscured by the efforts of writers to make them clearer still. The clarity of the rules is due to the circumstance that this branch of international law—unlike some branches—is one on which international tribunals have frequently been called upon to pronounce. It has, in fact, been elucidated to an unusual degree by a relatively small number of recent and authoritative judgments.¹ The obscurity arises from the fact that the terms and classifications traditionally employed by the writers have not to any great extent been followed by the courts in modern times. No comprehensive attempt to overhaul the traditional doctrine on the subject in the light of the recent decisions seems so far to have been made.

Nor can any such attempt be made in the present article. It will, however, be suggested that some clarification can be achieved by developing the notion of consolidation as a root of title in international law.

THE TRADITIONAL CLASSIFICATIONS

It has long been a practice for writers upon international law to classify the various methods by which a State may acquire title to territory. Thus, Wheaton said: "The exclusive right of every independent State to its territory and other property is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States."² And, according to Hall, "A State may acquire

* M.A., LL.B., Trinity College; Reader in International Law, London School of Economics.

¹ In particular, the *Island of Palmas* case decided by Judge Huber in 1928 (*American Journal of International Law*—referred to subsequently as *A.J.I.L.*—22 (1928), p. 867); the *Clipperton Island* case decided by the King of Italy in 1931 (*A.J.I.L.*, 26 (1932), p. 390); the case of the *Legal Status of Eastern Greenland* decided by the Permanent Court of International Justice in 1933 (*P.C.I.J. Series A/B No. 53*); and the *Anglo-Norwegian Fisheries* and *Minquiers and Ecrehos* cases decided by the International Court of Justice (*I.C.J. Reports* 1951, p. 116, and *I.C.J. Reports* 1953, p. 47).

² *Elements of International Law* (Dana's ed., 1866, section 161).

territory through a unilateral act of its own by occupation, by cession consequent upon contract with another State or with a community or single owner, by gift, by prescription through the operation of time, or by accretion through the operation of nature."³

By modern standards there are certain defects in these nineteenth-century classifications. Wheaton, for instance, appears to regard cession as an "original method" of acquiring territory, whereas later writers are unanimous in regarding it as a "derivative method." Hall seems to distinguish between cession and gift, whereas later writers regard gift as one way among three (the others being sale and exchange) of effecting a cession.⁴ A classification with a more modern ring about it is that of Lawrence who, in five successive sections of his book, deals with occupation, accretion, cession, conquest and prescription.⁵ This classification is, in effect, adopted also by de Louter,⁶ Fauchille,⁷ Hackworth,⁸ Brierly⁹ and Schwarzenberger.¹⁰ Oppenheim's classification is the same except that he uses the term "subjugation" in the place of "conquest."¹¹ Also, whereas some authors refer to "accretion" as the means of acquiring title to territory, others use the term "accession"—but no difference of substance is intended.¹²

³ *A Treatise on International Law* (6th ed., by Pearce Higgins, 1924, section 31). The first edition of Hall's treatise was published in 1880.

⁴ In another passage, where he refers to "Cessions of territory, whether by way of sale or exchange, and gifts . . ." so does Hall himself (*op. cit.*, section 35).

⁵ *The Principles of International Law* (4th ed., 1910, sections 74 to 78). The first edition of this work was published in 1895.

⁶ *Le droit international public positif*, vol. I (1920), pp. 339-73.

⁷ *Traité de droit international public*, vol. I, part II (8th ed., by Bonfils, 1925), sections 532-7.

⁸ *Digest of International Law*, vol. I (1940), sections 59-63.

⁹ *The Law of Nations* (3rd ed., 1942), pp. 120-6.

¹⁰ *A Manual of International Law* (3rd ed., 1952), pp. 52-5.

¹¹ *International Law*, vol. I (7th ed., by Lauterpacht, 1948), pp. 495-528. The reason for substituting "subjugation" for "conquest" is, apparently, the desire to emphasise that "conquest" alone—i.e., "the taking possession of enemy territory through military force in time of war"—is not sufficient to convey title from one State to another, but requires to be followed either by a cession or by a formal act of annexation. "Annexation," according to Oppenheim, "turns the conquest into subjugation," and thus "it is conquest followed by subjugation, and not conquest alone, which gives a title, and is a mode of acquiring territory" (*op. cit.*, pp. 518-9). It is somewhat controversial whether a cession or a formal act of annexation is always necessary, or whether in certain cases, notably the total disappearance of the enemy State, annexation may be implied. There would not, however, appear to be sufficient reason for departing from the normal term "conquest," especially as the Permanent Court of International Justice has thrown some light upon this particular method of acquiring title. (See the case of the *Legal Status of Eastern Greenland*, Series A/B No. 53, p. 47.)

¹² Thus Hall, Lawrence, Hackworth, Brierly and Oppenheim use the term "accretion." Schwarzenberger uses the term "accession." De Louter and Fauchille, writing in French, also use the term "accession."

Of these classifications it may be said that they are useful, perhaps indispensable, from the point of view of understanding, and above all of teaching, the subject. They carry with them, however, certain dangers, the chief of which is that they are not in general followed by international tribunals. Whereas international tribunals might be expected to indicate under which of these various heads they are awarding territory to State A rather than to State B, in fact they rarely do so. So much so that it is not unknown for a discussion to take place as to the appropriate head under which certain awards should be classified.¹³

Another classification much favoured by authors is that between "original" and "derivative" methods of acquiring territory. Thus, it is usual to classify occupation and accretion as "original" methods and cession as a "derivative" method, whilst the position in regard to conquest and prescription is somewhat doubtful.¹⁴ The present writer, however, agrees with de Louter that this particular classification serves no useful purpose.¹⁵ In so far as it leads to controversy and confusion, it is probably even harmful.

WESTLAKE'S APPROACH TO THE PROBLEM

It remains to mention another writer, namely, Westlake, whose approach to this problem was altogether different, and perhaps characteristically English, as the following passage shows:

"When the owner or claimant of land has to show his title to it he starts from the proved or presumed ownership of some one else at a past date, and deduces his own title from that of the latter person by a series of deeds, wills, and heirships. Or if his own ownership has extended over a length of time greater than that for which the law makes it necessary that title should be shown, he seeks no other root, but adduces acts of ownership done by him during the necessary period.

¹³ See, for instance, Sir Eric Beckett in *Recueil des Cours*, vol. IV (1934), pp. 218-55. Sir Eric here concluded that the Permanent Court of International Justice awarded *Eastern Greenland* to Denmark rather than to Norway on the basis of occupation, but that in the *Island of Palmas* case Judge Huber awarded the island to the Netherlands rather than to the United States on the basis of prescription. Not all, however, would accept this conclusion as entirely valid. In the recent *Minquiers and Ecrehos* case the International Court of Justice did not specify precisely under which of the normal heads, if any, it awarded the islets to the United Kingdom rather than to France.

¹⁴ Lawrence regards occupation and accretion as original methods, and conquest, conquest and prescription as derivative methods (*op. cit.*, section 74). Oppenheim regards accretion, occupation, subjugation and prescription as original methods, and cession as a derivative method (*op. cit.*, p. 498). Schwarzenberger regards occupation, accretion and prescription as original methods, cession as a derivative method, and conquest as a hybrid method (*op. cit.*, pp. 52-3.)

¹⁵ *Op. cit.*, p. 340.

In either case he has nothing to do with the origin of property as a subject of philosophical or prehistorical speculation, or with the usefulness of property as an institution and the desirableness of maintaining it."¹⁶

Therefore, said Westlake, in the international sphere,

"The State either pleads its own possession, where there is ground for contending that that gives a sufficient title, or by a series of cessions and successions it deduces its title from a root, found in a right of the same nature as that claimed and acknowledged to have belonged at a past time to some other State."¹⁷

Thus would a former Whewell professor and bencher of Lincoln's Inn simplify international law in regard to questions of title! Westlake, however, admitted that his system was only workable for what he called "old countries." By this expression he meant essentially Europe as opposed to the New World. When it was a question of "new countries," he found himself, like the other authors, compelled to discuss such doctrines as prescription, discovery and occupation.

In considering prescription, Westlake made it clear that he was not referring to "immemorial possession" but rather to "the rules which . . . fix a certain lapse of time either for acquisitive prescription or usucapion, that is for transmuting possession acquired in good faith into property, or for prescription properly so called, that is for barring claims against a possessor."¹⁸ This language is not as clear as one might wish, but it seems that Westlake did not regard "immemorial possession" as forming part of prescription at all. In this opinion he was not alone.¹⁹ He was, however, in our view, mistaken. At any rate he was at variance with Hall, whose writing on this subject, as on so many others, was exceptionally lucid, and who would seem to have indicated the true position when he said: "Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has

¹⁶ 2nd ed. (1910), p. 90.

¹⁷ *Ibid.*, p. 91.

¹⁸ *Ibid.*, p. 94. The expression "acquisitive prescription" is frequently used in this context in order to distinguish between prescription as a method of acquiring title to territory and "extinctive prescription," i.e., the principle that, if State A has an international claim against State B, such claim will be *extinguished* if State A does not take reasonable steps within a reasonable time, first, to notify the claim to State B, and, secondly, to prosecute the claim by whatever means are available.

¹⁹ See the list of authors cited in P. A. Verykios, *La prescription en droit international public* (1934), p. 44, n. 1.

neglected to assert his right, or has been unable to do so.”²⁰ Thus, for Hall, whilst the essence of any form of prescription lay in possession, there were really two kinds of prescription. The first arose out of the simple fact of possession over a long period; the second arose out of a possession that was, at any rate in its early stages, adverse. We may refer to these two kinds as “straightforward possession” and “adverse possession.” The new expression “straightforward possession” is substituted for the more normal expression “immemorial possession” because it is believed that the latter is a somewhat inappropriate term for the international scene.²¹ It was once defined by an international tribunal as a possession which has lasted for so long a time “that it is impossible to furnish the proof of a different situation . . .”²² Since, in any international arbitration, the parties have all the resources of historical research at their disposal, the notion of such a possession is wholly unrealistic.

DIFFICULTIES ATTENDANT UPON THE USE OF THE TERM “PRESCRIPTION”

In an article published a few years ago²³ it was argued that, although a few writers deny the existence of prescription as a method of acquiring title to territory under international law, both the opinions of the majority of writers and the decisions of international tribunals lend firm support to the view that such a method exists. It was also contended that even those writers who deny the existence of prescription as such in international law admit the existence of a somewhat similar method of acquiring title, which they refer to as “immemorial possession.” It was further suggested that, even among the writers who admit the existence of prescription, there is a tendency to distinguish between “immemorial possession” and “prescription properly so called” (by which essentially is meant “adverse possession”). Nevertheless an attempt was made in the article to embrace in a single definition, under the heading of “acquisitive prescription,” both the notion of “immemorial possession” and the notion of “prescription properly so called.” The view was also put forward that, since occupation is a means of acquiring territory which is *res nullius*, and since the high seas are *res communis* in which all

²⁰ *Op. cit.*, section 36.

²¹ Alternative to “straightforward possession” would be “simple possession” or “possession *simpliciter*.”

²² The arbitration between Austria and Hungary concerning certain lakes in Galicia in 1902, reported in *Revue de droit international et de législation comparée* (Deuxième Série) 8 (1906), p. 207.

²³ “Acquisitive Prescription in International Law,” by the present writer, in *British Year Book of International Law*, 27 (1950), p. 332.

States have an interest, it is through prescription exclusively, rather than through occupation, that States can acquire special rights over the high seas, such as a wider belt of territorial waters than that allowed under general international law. For prescription provides for the notion of "adverse possession," whereas occupation does not.

In retrospect it is realised that any attempt to combine in a single definition, under the heading of "acquisitive prescription," both the notion of "immemorial possession" (straightforward possession) on the one hand and the notion of "prescription properly so called" (adverse possession) on the other hand is fraught with difficulties. It is not that the task of framing a single definition is inherently impossible. Indeed this task was, in a general sense, performed by Hall.²⁴ It is rather that the terminology has become so confused as to render the choice of the expression "acquisitive prescription," or "prescription" in any form, for the general heading probably an unwise one. We have already referred to the tendency among the earlier writers to understand by "prescription properly so called" essentially the notion of "adverse possession" and to distinguish between "prescription properly so called" and "immemorial possession."²⁵ This tendency has been confirmed in more recent years by the laudable attempts, such as those of Sir Eric Beckett, to distinguish between prescription on the one hand, and occupation on the other hand. Thus, in his lectures at the Hague Academy in 1934, Sir Eric said of prescription that it "differs from occupation in that it is a method of acquiring territory which is not *res nullius*, but which is under the full sovereignty of another State." Although Sir Eric was careful to add that prescription also covers cases of the acquisition of territory "which, although not under the full sovereignty of another State, is subject to the partial or incomplete rights of another State, such as an inchoate title based on discovery and not followed up by occupation," here was firmly implanted the idea of prescription as essentially an adverse possession.²⁶

As a good example of the tendency to regard prescription purely as a means of acquiring title through an adverse possession

²⁴ Above, pp. 218-9.

²⁵ For the sake of completeness, however, mention should also be made of an opposite tendency. Thus, according to one author, "prescription only applies to a territory which is either *territorium nullius* or has been abandoned by another State." (Schwarzenberger, *International Law: Vol. I, International Law as applied by International Courts and Tribunals* (2nd ed. 1949), p. 141.

²⁶ Sir Eric Beckett also classified under prescription cases of the acquisition of territory where the former sovereign, without having abandoned the territory, had nevertheless begun to lose the effective possession or control. (*Op. cit.*, p. 248.)

may be cited the recent *Minquiers and Ecrehos* case before the International Court of Justice.²⁷ Here, if anywhere, the parties had good reason to invoke the notion of "immemorial possession." Each side pleaded a very long possession of the disputed islets indeed, amounting to approximately a thousand years. Yet, significantly, neither side invoked the doctrine of prescription as such. Both parties seem to have felt that that doctrine was associated too much with the idea of adverse possession. Consequently, they tended to put forward prescription purely as an alternative basis of claim, to be used only if it were held that the original title lay with the other party and if, therefore, the possession which they relied upon was originally an adverse possession. The court in its judgment threw little light on the doctrine of prescription. It did, however, emphasise—perhaps even more than any international tribunal had done previously—the importance of effective possession, as opposed to an abstract title, under international law. "Any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers," said the court, "must ultimately depend on the evidence which relates directly to the possession of these groups." And, again, "What is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups."²⁸

It may also be said of the *Minquiers and Ecrehos* case that it illustrates the merits of Westlake's approach as compared with that of the majority of writers. But this is not surprising, seeing that Westlake was providing mainly for disputes between "old countries," whereas on the whole the other writers have tended to work out their doctrines primarily with colonial disputes in mind.

The International Court of Justice had also to consider questions relating to prescription in the *Anglo-Norwegian Fisheries* case, though again it threw little light upon the doctrinal aspect of the matter. The court had to decide whether the Norwegian method of delimiting territorial waters was valid on the basis of an historic title, even if it should be held—which, in fact, it was not—that the method was invalid under general international law. "In its opinion," said the court, "Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters

²⁷ *I.C.J. Reports* 1953, p. 47. See also the article by the present writer in *International and Comparative Law Quarterly*, 3 (1954), p. 189.

²⁸ At pp. 55-7 of the report.

must now be recognised although it constitutes a derogation from the rules in force.”²⁹ After thus stating the Norwegian Government’s attitude, however, the court did not expressly indicate whether it approved this attitude or not. But, having regard to the general tenor of the judgment, it seems reasonable to conclude that the court approved it. The court also made the following observations on the question of Norway’s historic title:

“From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, *the basis of an historical consolidation which would make it enforceable as against all States*. . . . The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom.”³⁰

It seems reasonable to deduce from these various passages that the court recognised the existence both of “immemorial possession” (straightforward possession) and of “prescription properly so called” (adverse possession) as methods of acquiring title to territory. The court also seems to have confirmed the view that the appropriation by a single State of areas, which under general international law would be high seas, is a kind of adverse possession at the expense of the international community which requires the toleration or acquiescence of the generality of States. Given even a narrow definition of prescription, therefore, it is reasonable to conclude that title to such areas must be acquired through prescription rather than through occupation.

A NEW APPROACH BY PROFESSOR DE VISSCHER

It is now proposed to direct attention to the italicised portion of the passage quoted above because, in a recently published book, Professor Charles de Visscher, the distinguished Belgian jurist who

²⁹ *I.C.J. Reports*, 1951, p. 116 at p. 130.

³⁰ *Ibid.*, pp. 138-9. Italics ours.

was a member of the court at the time of the *Anglo-Norwegian Fisheries* case, appears to have made this portion, and the passage as a whole, the starting-point of a new and interesting approach to the problem. Under the heading "La consolidation par titres historiques" Professor de Visser refers generally to the important place held in international law by "consolidation" as a method of acquiring title to territory. This method, he says, differs from "la prescription acquisitive proprement dite" in that, in addition to applying to cases of adverse possession, it is also a means of acquiring title to "des territoires dont l'appartenance antérieure à un autre Etat ne saurait être établie." By comparison, "la prescription acquisitive . . . tend à conférer un titre d'acquisition relativement à un territoire soumis à la souveraineté d'un autre Etat." Professor de Visser also gives it as his view that consolidation differs from occupation "par le fait qu'elle peut être admise pour certains espaces maritimes aussi bien que pour le domaine terrestre."³¹ He has thus embraced under a single heading the notion of straightforward possession on the one hand and of adverse possession on the other hand. He has, however, chosen as his general heading not the normal expression "acquisitive prescription," but rather the new expression "consolidation." As he himself says: "pour éviter des discussions inutiles, on préférera le terme consolidation à celui de prescription acquisitive."³²

It seems, therefore, that Professor de Visser has simplified the problem considerably. Under the single heading of "consolidation" it is now possible, as has just been indicated, to include both "straightforward possession" and "adverse possession." As for the expressions "acquisitive prescription" and "prescription properly so called" the way is now open either to abandon them altogether or else to confine them—as there has always been a tendency to confine them—to cases of "adverse possession."

The theory of "consolidation" may, however, have an even wider significance than the mere removal of certain confusions which had developed round the theory of "prescription." As Judge Huber indicated in the *Island of Palmas* case, it is necessary that a title be not only acquired, but also that it be continuously maintained, following "the conditions required by the evolution of law." Maintenance of a title is achieved through a State "manifesting its territorial sovereignty in a manner corresponding to circumstances." The circumstances vary "according as inhabited or uninhabited regions are involved." Another relevant factor is

³¹ *Théories et Réalités en Droit International Public* (1953), pp. 244-5.

³² *Op. cit.*, p. 243, n. 2.

the absence or presence of competing claims giving rise to disputes. But if there is a dispute and "if the contestation is based on the fact that the other party has actually displayed sovereignty," then "it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. The demonstration consists in the actual display of State activities such as belongs only to the territorial sovereign."³³

Judge Huber did well to stress the importance of *maintaining* titles as well as *acquiring* them, because there is a tendency among the writers to place less emphasis upon this aspect of the matter.³⁴ It is true that methods of *losing* titles are sometimes classified along with methods of acquiring them. But this practice seems to presuppose that, if a title is not actually lost through one of the recognised methods of loss, it is automatically maintained. This is to raise a large, and somewhat controversial, issue. In view of the eminence of the arbitrator and the exceptional breadth and clarity of his reasoning, there has been a tendency to regard Judge Huber's Award in the *Island of Palmas* case almost as an oracular pronouncement. Yet, as Professor Jessup has pointed out, one result of Judge Huber's approach might be that "Every State would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition. If such a principle were applied to private law and private titles, the result would be chaos. Title insurance would be an impossibility." Professor Jessup also criticises Judge Huber on the same issue for failing to consider sufficiently the question whether Spain (through whom the United States was claiming as successor) had ever "abandoned" the Island of Palmas.³⁵

It is not possible, within the scope of this article, to consider in full Professor Jessup's criticisms of the *Island of Palmas* Award. It is believed, however, that many of these criticisms answer themselves provided it be understood that, whilst every title under international law must undergo a continuous process of "maintenance" or "manifestation," the degree of "maintenance" or "manifestation" required varies in accordance with the circumstances. In particular, it depends upon the absence or presence of competing claims. When such claims are present, a

³³ *Loc. cit.*

³⁴ Wheaton, however, indicated that titles must be "subsequently confirmed.

Above, p. 215.

³⁵ *A.J.I.L.*, 22 (1928), pp. 740-1.

considerable degree of "manifestation" will be required. When they are absent, it may be sufficient merely that loss by abandonment can not be proved—provided always that, as soon as a competitor intrudes, the reaction of the legitimate proprietor is reasonably thorough and instantaneous. On this basis, Spain lost her title to the Island of Palmas—if she ever had it—through not sufficiently manifesting her title in the face of growing competition from the Netherlands. What, on the contrary, enabled France to retain her title in the *Clipperton Island* Arbitration was that, although she displayed no sovereignty over the island for nearly forty years after acquiring it in 1858, she nevertheless took immediate steps to assert her title as soon as it was challenged by competitors in 1897.³⁶

It is submitted that the process of "maintaining" or "manifesting" a title, to which reference has just been made, is in essence a process of "consolidation," different in degree perhaps, though certainly not in kind, from the "consolidation" by which a title may sometimes be acquired in the first place. If this submission be true, it may be possible, employing the notion of "consolidation," to present the law relating to title to territory on a new basis. Such a basis would stress the close relation between the *acquisition* and the *maintenance* of titles. It would avoid the ambiguities surrounding the present doctrine of acquisitive prescription. Also, without abandoning the system of classification favoured by most of the writers, it would endeavour to embody much of the practical wisdom contained in Westlake's approach to the problem.

³⁶ *A.J.I.L.*, 26 (1932), p. 390.

FALSE MEASURES IN THE ROMAN LAW OF SALE

PETER STEIN *

MEASURES, such as weights, were used in the Roman law of sale for two purposes, (a) to determine the amount of the price of a given lot, and (b) to separate the object of sale from a larger bulk.¹ Weights which are heavier than they should be always operate in favour of the buyer, while weights which are too light always benefit the seller. But it is here suggested that this fact has tended to blur the distinction between the two cases which ought to be considered separately, and that consequently there has been some confusion in the interpretation of certain texts, dealing with the effect of false measures.

In the first case, the parties agree on the sale of a specific lot, the weight of which is not known to them (*e.g.*, all the flour in that sack), at so much a pound. The parties know exactly what the buyer will receive, but the amount payable by the buyer will not be known until the goods have been weighed. If the weights are too heavy, the goods will seem to weigh less than they do in fact, and the buyer will pay less for them than he should. If they are too light, he will pay too much. In the second case the parties agree on the sale of a fixed amount to be taken from a specific lot (*e.g.*, so many pounds of flour from that sack) at so much a pound (*e.g.*, Vat. Fr. 16; D.18.1.35.7). In this case the amount payable by the buyer is known at the time of the agreement; what is not known is which part of the whole the buyer will receive. This will be ascertained when the goods are weighed. If the weights are heavier than they should be, the buyer will receive a larger quantity of the goods than he is entitled to receive. If they are too light, he will receive too little.

The remedy accorded to one party to compensate him for the advantage gained by the other party as a result of the false weights is not necessarily the same in each of these cases. In the first case, where the buyer gets what was intended but pays

* of Gonville and Caius College, M.A., LL.B.; Lecturer in Roman Law in the University of Aberdeen.

¹ Sale of a *genus* (*i.e.*, of goods by description, not from an existing stock) was not considered to come within the scope of *emptio venditio* at all, according to the best opinion, de Zulueta, *Roman Law of Sale*, 16, Arangio-Ruiz, *La Compravendita nel diritto romano*, I.121.

less for it than was intended, one would expect *a priori* that the seller could recover the balance of the price by the *actio ex vendito*, since the buyer is bound by *bona fides* to pay it. There appears to be no text discussing false weights which deals with this case, but our view is confirmed by D.11.6.3.3. (Ulpian, lib. xxiv ad ed.) *Sed si venditor majorem modum tradiderit fraudatus a mensore, consequenter dicit Pomponius non esse actionem adversus mensorem, quia est ex vendito actio adversus emptorem, nisi et hic emptor solvendo non sit.*

The jurist is discussing the liability of a surveyor who deceived the seller as to the extent of the land being sold, with the result that the seller transferred a greater amount (*majorem modum*) than he was aware of. Pomponius declares that the seller has no action against the surveyor since he can sue the buyer by the *actio ex vendito* to recover the balance of the price. This case, like all sales of land, in practice, comes within the first type. The parties agree on the sale of a specific plot of land, the price to be determined by its extent,—so much an acre. The seller intends to transfer that plot, but receives a lower price for it on account of the surveyor's low estimate of its extent. The second type of case (*e.g.*, four acres of that field) must be rare in sales of land.²

The second case appears to be the subject of three texts dealing with the use of false weights by the buyer or seller.

(a) D.19.1.32 (Ulpian, lib. xi ad ed.) *Si quis a me oleum quod emisset adhibitis iniquis ponderibus accepisset, ut in modo me falleret, vel emptor circumscriptus sit a venditore ponderibus minoribus, Pomponius ait posse dici venditorem sibi dare oportere quod plus est petere, quod habet rationem; ergo et emptor ex empto habebit actionem qua contentus esse possit.*

This text, in which again Ulpian quotes Pomponius, is taken from the former's commentary on the edict "*De Dolo Malo.*"³ As it stands, it deals with two cases in which actions other than the *actio de dolo* are available, so that owing to its subsidiary character, that action is excluded. However, there are indications that the text represents an amalgamation, for the sake of brevity, of two passages.⁴ One dealt with the buyer's liability for using

² It may well be that *nisi . . . non sit* is interpolated (Albertario, *Filangieri*, 36, 811), but the doubts of Heldrich (*Das Verschulden beim Vertragsabschluss*, 36, n. 2) as to the rest of the text are without foundation. D.19.2.19.6., which he cites, is not relevant.

³ Lenel, Pal. 388.

⁴ The change of person, *ego*—*venditor*, and of tense, *emisset*—*circumscriptus sit*; the illogicality of *ergo*, Haymann, *Z.S.S.* 40 (1919) 353, *cf.* Beseler, *Beiträge*, 4.133, who points out that only one case is decided by Pomponius.

weights which are too heavy, the other with the seller's liability for using weights which are too light.

If it be admitted that both passages contemplated the sale of an agreed quantity from a larger stock of oil, in the first the buyer has received more oil than he was intended to have. The sale would only be *perfecta* when the oil had been weighed out, and the pluperfect *accepisset* shows that the weighing in this case took place at delivery. Thus the formation and performance of the contract are here simultaneous.⁵ The question at issue is whether the buyer is liable with the *actio de dolo* or with a *condictio*, as indicated by the formula *dare oportere*. Already in the sixteenth century, Cujas pointed out that the *actio ex vendito* is not here available to the seller, because the oil which the buyer has received over and above the agreed quantity was not included in the sale.⁶ He gives the seller a *condictio indebiti* to recover the surplus oil from the buyer. Haymann, basing himself on Gaius, Inst. 4.4, holds that the *condictio furtiva* is meant.⁷ As the cause of action in a *condictio* is not stated, there would appear to be no difference in the formula. In this case the buyer, being fraudulent (*ut . . . falleret*), would commit theft (see the next text) so that the *condictio furtiva* would be intended. The seller would also presumably have the *actio furti* against the buyer. But where the buyer has innocently used weights which are too heavy, the *condictio indebiti* would be appropriate.

Heldrich maintains that the seller has the *actio de dolo* concurrently with a *condictio*.⁸ Pomponius gave to the words of the edict *si alia actio non sit* the interpretation *quasi res alio modo ei ad quem ea res pertinet salva esse non poterit*.⁹ Heldrich holds that this means that the *actio de dolo* only gives way to such remedies as are adapted to procure damages for the injured party, and that the *condictio* for unjustified enrichment is not such a remedy. But he cites no text in favour of this argument, which seems unsound. Ulpian intended to exclude the *actio de dolo*. Both where the buyer is fraudulent and where he is innocent, the seller is adequately protected.

In the second passage of the text, the weights are too light and so the buyer receives less than the agreed quantity of oil. As a result he has the *actio ex empto* against the seller to compel

⁵ Kunkel, Z.S.S. 46 (1926) 435, is therefore wrong in suggesting that the passage does not deal with the formation, but only with the performance of the contract.

⁶ *Comment. ad Tit. XIX.1*, Opera, edn. Venice 1758, Vol. VII, 785.

⁷ *Loc. cit.*

⁸ *Verschulden*, cit., 16.

⁹ D.4.3.7.pr.

delivery of the balance. This again accords with what would be expected *a priori*.

(b) D.47.2.52.22. (Ulpian lib. xxxvii ad ed.) *Majora quis pondera tibi commodavit cum emeris ad pondus: furti eum venditori teneri Mela scribit; te quoque si scisti, nam non ex voluntate venditoris accipis, cum erret in pondere.*

The text comes from Ulpian's commentary on the edict concerning *furtum nec manifestum*,¹⁰ and discusses the liability of a third party who has knowingly loaned to the buyer weights which are too heavy. Mela, whose decision Ulpian reports, gives the seller the *actio furti* against the lender. He then makes the buyer similarly liable, "if he knows" (presumably, that the weights are false). Finally appears what seems to be a reason for the latter decision¹¹—the buyer does not receive the goods with the seller's assent, since the latter is mistaken about the weight.

Mela's decision against the lender shows a very wide view of theft. Three objections could be made to it. First, there has been no *contractatio* by the lender. But Buckland pointed out that there has been a *contractatio* procured by him.¹² Secondly, the lender's act was not *lucri faciendi gratia*. But this was probably not required by the classical jurists.¹³ A third and more significant objection is that the taking was not *invito domino*. Jolowicz, who makes this objection, holds that this is a sale of a specific lot, where the seller intends to transfer the property in all the goods in the lot, whatever their weight may be,¹⁴—i.e., the first type of case described above. In such a case the receipt of the goods by the buyer could not be said to be against the seller's will. But if, as is suggested, this is a case of the second type, of an agreed amount from a larger mass—and there is nothing in the text against this view—then the seller intends to transfer only the agreed quantity (e.g., 10 lb. from that sack). He would then not assent to the transfer of the additional amount which the buyer has received owing to the inaccurate scales. The surplus would have been taken *invito domino*, and it could properly be said to the buyer, *non ex voluntate venditoris accipis*.

The second part of Mela's decision, introduced by *te quoque* (referring to the buyer) has been condemned by Haymann, who considers *si scisti* to be too vague, and who objects to the final reason.¹⁵ Jolowicz says, "Probably the original text merely

¹⁰ Lenel, Pal. 1042.

¹¹ *Nam* is not in the MSS but is supplied by most editors.

¹² *Contractatio* (1941) L.Q.R. 472.

¹³ Jolowicz, *Dig. XLVII.2., De Furtis*, lix.

¹⁴ *Op. cit.* 77.

¹⁵ *Loc. cit.*

reported that Mela held the buyer liable too, if he was aware of the trick, it having made no difference in his time whether the property passed or not. The compilers however, thinking that there could be no theft if the property had passed, tried to invent a reason why it should not have done so."¹⁶ Buckland justly called Haymann's objection to *si scisti* "hypercriticism in excelsis,"¹⁷ and to the second objection it may be repeated that *non ex voluntate venditoris accipis* is quite in point, although the final phrase *cum erret in pondere*, is probably a gloss. If the buyer is aware of the state of the weights, the seller can sue him both by the *actio furti* and the *condictio furtiva*, as was suggested by the previous text.

(c) D.4.3.18.3. (Paul, lib. xi ad ed.) *De eo qui sciens commodasset pondera ut venditor emptori merces adpenderet, Trebatius de dolo dabat actionem. Atquin si majora pondera commodavit, id quod amplius mercis datum est repeti condictione potest, si minora, ut reliqua merx detur ex empto agi potest; nisi si ea condicione merx venit, ut illis ponderibus traderetur, cum ille decipiendi causa adfirmasset se aequa pondera habere.*

This text comes from Paul's commentary on the edict "*De Dolo Malo*,"¹⁸ and also discusses the liability of one who knowingly lends false weights to be used in a sale. It has clearly been much abbreviated. Apart from the absence of an adjective qualifying *pondera*, it is at first sight, as Haymann notes,¹⁹ difficult to see to whom the loan is being made. But since the seller is to weigh out the goods (*venditor . . . adpenderet*), it may be assumed that the loan is made to him. Thus the case is distinguished from that discussed by Mela, where the loan was made to the buyer.

Heldrich, who reads *majora* after *pondera*, sees in 47.2.52.22 and 4.3.18.3 evidence of a dispute between Mela and Trebatius.²⁰ The latter, he says, took the view that the seller intends to transfer to the buyer the amount weighed out, not merely the agreed amount, so that the buyer acquires the whole amount by the will of the seller, and there can consequently be no theft but rather an obtaining by fraud. Thus where Mela gave the seller a *condictio furtiva* against the lender of the weights, Trebatius gives him an *actio de dolo*. This alleged dispute is misconceived. Although it is possible to regard the case where the loan is made

¹⁶ *Op. cit.*, 78.

¹⁷ *Loc. cit.*

¹⁸ Lenel, Pal. 209.

¹⁹ *Op. cit.*, 354.

²⁰ *Op. cit.*, 35.

to the buyer, who then weighs the goods, as theft from the seller, no jurist could so regard the case where the loan is made to the seller, who then does the weighing himself. According to Haymann, Trebatius discussed the same school-case as Mela, and anticipated the latter's decision by excluding the *actio de dolo* in favour of the *actio furti* against the fraudulent lender and also against the buyer if he were *sciens*, and "an *actio venditi* or *condictio indebiti*" against the buyer, if he were in good faith. But this is pure conjecture. Mela and Trebatius discussed different cases. There are no grounds either for postulating a dispute or for harmonising their decisions.

Recently Schwarz has suggested that Trebatius was considering whether to give the *actio de dolo* not against the lender, but against the buyer who had profited by *pondera maiora*, i.e., the question faced by Ulpian in 19.1.32.²¹ Admittedly this would fit in with the argument in the second part of the text, which repeats Ulpian's two decisions, and where there appears to have been similar amalgamation of the cases of *pondera minora* and *pondera maiora*. But the suggestion involves excising *De eo qui sciens commodasset* as "überflüssige Zutat." The subjunctive suggests that this clause was in the original text, which did discuss the liability of the lender, as well as the liability of the parties to the sale. Probably Trebatius gave the *actio de dolo* against the lender, while Paul excluded it in favour of the *actio commodati contraria*, which had been developed meantime.²² So far as it concerns sale, the text shows that even though the seller himself did the weighing, if the weights were too heavy, he could still recover the surplus which he had delivered over the agreed amount by *condictio (indebiti)* since there is no *furtum*).

In conclusion, the rules deducible from this consideration of the texts may be summarised:—

(a) If the sale is of the whole of a specific lot, at so much a pound, the seller intends to transfer the whole. Where false measures in the buyer's favour have been used, the seller can recover the balance of the price due to him by the *actio ex vendito*. Where the measures are in the seller's favour, the buyer can recover the amount overpaid by *condictio indebiti*.

(b) If the sale is of a fixed quantity from a larger mass, at so much a pound, the seller intends to transfer to the buyer no more than the agreed amount. Where false measures in the buyer's favour have been used, the seller can recover the value of the

²¹ Z.S.S. 71 (1954) 132.

²² Kübler, Z.S.S. 38 (1917) 106; Pastori, *Il Commodato nel diritto romano*, 1954, 389.

surplus goods delivered by *condictio: indebiti*, if the seller did the weighing, or if the buyer did it innocently, *furtiva*, if the buyer did it fraudulently. Where the measures are in the seller's favour, the buyer can enforce delivery of the undelivered part of the goods by the *actio ex empto*.

BOOK REVIEWS

Law and Morality. By LEON PETRAZYCKI. Translated by HUGH W. BABB, with an introduction by NICHOLAS S. TIMASHEFF. 20th Century Legal Philosophy Series: Vol. VII. [Cambridge: Massachusetts. Harvard University Press. 1955. xlvii and 335 pp. \$7.50 net.]

SOCIAL reform has not been conspicuous among the avowed aims of British writers on Jurisprudence, who, on the whole, have devoted more attention to the internal consistency and logical tidiness of their subject-matter than to understanding or improving the society to which it is relevant. The basic concept of their Jurisprudence—if indeed any such concept emerges clearly from their writings—is usually a concept of law defined in terms suitable only for identifying and distinguishing the social phenomena of special relevance to the work of the legal practitioner. More briefly their concern is with “lawyers’ law” as it is, and little more attention is given to the society in which it operates than to the methodological considerations which would need to be respected if their works were to lay claim to the status of scientific theories. It is therefore a stimulating and indeed almost exhilarating experience to read a work which begins with a careful discussion of the requirements of an adequate scientific theory and then proceeds to the establishment and discussion of a concept of law defined in terms relevant to the understanding of society and the improvement of social arrangements. Your reviewer would have given a great deal to have had this translation available twenty years ago.

Petrzhitsky (to adopt the more pronounceable Russian form of his Polish name) avowedly designs his theory of law to provide a scientific basis for a science of legal policy. To this end he applies the term law to the totality of a certain type of psychological process, “legal experience,” which may occur in individuals and is directly revealed by introspection. This subjective process is held to constitute the reality underlying all discussions concerning social rights and obligations, and all social norms, including “lawyers’ law.” The structure of this experience or process includes an “impulsion” to action, an impulsion of obscure origin, but one which is felt as an inward limitation on freedom proceeding from a somewhat mystic authority, and is described as a feeling of obligation. It also includes a mental image of the appropriate action and the idea of the conditions under which it is to take place. So far these characteristics are, by definition,

common to both moral and legal experience; legal experience is differentiated by the accompanying feeling that the course of action felt as obligatory can be claimed by another as his right. This is expressed by saying that moral experience is purely "imperative," legal experience is "imperative-attributive." In both moral and legal experience (which are sub-species of ethical experience) the cause of specific impulsions may be felt to be either internal (intuitive) or external (positive), giving rise to intuitive and positive species of both morality and law. "Official" law, or lawyers' law, includes both positive and intuitive elements.

In positive law the causes of specific legal experiences are "normative facts," *e.g.*, statutes, customs, the rules of games, etc.,—or, more strictly, ideas of the existence of such facts—and images of these facts enter into the structure of legal experience or the reality of law. By a process of projection, however, the mind attributes to these normative facts qualities which really belong to the psychological processes they stimulate. The normative facts are thus imagined "to have the character of norms," "to create rights and obligations," "to create legal persons," and so on. These misleading forms of speech then divert the search for realities, *i.e.*, the investigation of the "nature" of norms, rights, duties, persons, etc., into strange and unprofitable directions. For the binding force or normativity, for instance, which is projected on to a normative fact, is as subjective as the beauty projected on to a rose; in either case the reality lies in the experiencing mind of the beholder. Thus an adequate theory of law has to begin by constructing new concepts, designed to direct attention to these realities—the psychological realities underlying lawyers' and other types of "law"—to facilitate the investigation of their properties and tendencies of development, and to display their relationships to individual personalities and other vital components of the social structure. The theoretical work initiated by Petrazhitzky on these lines still awaits its adequate development. There seems no reason why it should not include, and illumine, concepts relevant to a more specifically lawyers' jurisprudence within the framework of a general theory of society.

In his admirable introduction Professor Timasheff tells us that Petrazhitzky, already a jurist, found it necessary to construct for himself a new logic, and then a new psychology. His thought in both fields seems remarkably in line with more recent developments, and particularly with the independently developed thought of the Swedish realists. His two major works appeared in 1905 and 1907 and provoked a storm of opposition in Russia, but have hitherto been little known in the outside world. The editors of this series are to be congratulated on their decision to publish an amalgamated English translation, and the translator on his success in producing a version which, after excisions and abbreviations, is itself clear

and readable. There can be little doubt that it earns its place as one of the classics of legal philosophy.

Petrazhitsky taught that the end of law was social solidarity. He was a firm believer in an evolutionary law of progress. The millennium, he knew, was not yet at hand, but he held that an intermediate task of law was to educate men in the spirit of active love for their neighbours. Transferring from St. Petersburg to Warsaw after the Treaty of Riga in 1921 he put an end to his life ten years later at the age of sixty-four.

B. E. KING.

Islamic Law in Africa. By J. N. D. ANDERSON, Professor of Oriental Laws in the University of London, with a foreword by the RT. HON. LORD HAILEY. Colonial Research publication, No. 16. [London: H. M. S. O. 1954. viii and 380 and (index) 29 pp. £2 10s. net.]

J. N. D. ANDERSON est professeur de "droits orientaux" à l'Université de Londres. En fait, il ne s'occupe que de droit musulman; il ne peut en être autrement, car la matière est beaucoup trop vaste et encore a-t-il dû se spécialiser davantage. En vue de comprendre la nature de cet important ouvrage, il est bon d'en situer la place au milieu des études de droit musulman en général.

La Loi musulmane (ce terme est préférable à celui de Droit musulman) est en effet un immense ensemble casuistique que l'on ne saurait mieux comparer qu'au Talmud.

C'est dire que la tâche à accomplir jusqu'ici considérée comme l'unique, ou, à tout le moins l'essentielle, était la suivante: (a) étudier les textes arabes et en dégager les solutions; (b) exposer également toujours sur la base des textes, la théories des "sources" (*ouçoûls*) de la Loi; (c) s'efforcer de reconstituer l'histoire, brève mais très obscure, du développement de la Loi musulmane. Pour tout ceci il a existé à l'heure actuelle au monde, qu'un seul Maître, ou peut-être deux: J. Schacht (Leiden), et sans doute R. Brunshvig (Bordeaux).

Mais, depuis quelque temps, de nouveaux problèmes juridiques très importants ont retenu l'attention des savants, dans le domaine du droit musulman.

La Loi musulmane théorique, en effet, a la prétention de vouloir régler toute la vie du croyant et de la communauté. En réalité, elle n'a jamais été appliquée dans la pratique, qu'à un nombre limité d'institutions et tout particulièrement au statut personnel et successoral. Or, même en ceci, qui touche de si près à la religion, le besoin de rénover et de modifier le vieux droit traditionnel, prétendu immuable, s'est fait sentir surtout depuis

la guerre de 1914-18, et des réformes souvent importantes ont été accomplies.

D'autre part, là où il n'y a pas eu de réformes, l'adaptation, déjà ancienne, de la Loi à la réalité, et en particulier, l'existence d'une grosse influence du droit coutumier préislamique sur les institutions juridiques concrètes, posent au juriste et à l'islamologue des problèmes du plus haut intérêt.

C'est dans ces études là que s'est spécialisé le Pr. Anderson; presque toutes ses publications, et, en particulier, son livre *Islamic Law in Africa* y sont consacrés.

Le signataire de ces lignes a vu l'auteur s'engager dans cette voie avec d'autant plus de satisfaction, qu'en ce domaine la Faculté de Droit d'Alger a fait oeuvre de pionnier: il y a 20 ans, en effet, elle créait un enseignement spécial, celui du "Droit musulman comparé," qui aurait, en effet, pour bût d'étudier ces problèmes. L'exemple du Pr. Anderson prouve qu'elle a été bien inspirée.

L'intérêt de *Islamic Law in Africa* dans ce domaine, est considérable: de ce point de vue, en effet, il n'existe, nulle part à l'heure actuelle, un ouvrage qui puisse se comparer à ce livre. On ne possédait que des données tout à fait fragmentaires, touchant l'application du droit musulman, dans les régions étudiées par lui, et encore jamais un spécialiste ne s'était penché sur ces questions.¹ Or l'auteur a embrassé, dans son étude, l'ensemble des possessions anglaises d'Afrique (plus Aden). Lorsqu'il écrit (p. 1): "It was something which had apparently never been attempted before," il faut lui donner entièrement raison. C'est une contribution notable à la connaissance du droit qu'il nous a fournie.

On pourrait, peut-être, songer à lui reprocher la rapidité de son enquête: six mois seulement pour des visites à onze régions différentes, soit moins de trois semaines pour chaque système juridique, sans compter les voyages. Cette objection est sans valeur: ce qui compte, c'est le résultat et, si le résultat est bon, nous aurons simplement à admirer la rapidité d'esprit dont l'auteur a fait preuve. D'autre part, ceci implique nécessairement qu'il connaissait bien a priori la matière; sans quoi il lui aurait été impossible de réaliser cette prouesse. Le fameux Abbé du 18^e siècle, Galiani a écrit (en français dans l'original): "Souvenez-vous que même le plus grand sot peut répondre, si on le consultait, mais il n'y a que le grand homme qui sache interroger." Il y a du vrai dans cette boutade!

Quoi qu'il en soit, nous trouvons réunie dans ce livre pour la première fois une masse énorme de données des plus précieuses, et qui étaient demeurées, par exemple, absolument inconnues jusqu'à ce jour du signataire de ces lignes: pour notre part, nous sommes extrêmement reconnaissants au Pr. Anderson de nous les

¹ Sauf J. Schacht pour la Nigeria.

avoir fournies et elles ne manqueront pas de nous être de la plus grande utilité.

Peut-on ensuite reprocher à l'auteur d'avoir manqué d'esprit de synthèse? On aurait pu penser, en effet, à une exposition très différente: cela aurait consisté, p. ex. à étudier pour tous les pays à la fois: 1°) Le problème de la judicature; 2°) celui du mariage; 3°) celui de la répudiation, etc. Il n'est pas certain que ceci eut mieux valu; au stade actuel des recherches de l'auteur, une série de solides monographies doit encore être préférée à une synthèse hâtive.

Nous souhaitons, toute fois, que, dans quelques années, lorsque l'auteur aura pu étudier tous les pays d'Islâm intéressés, il nous donne une vue d'ensemble des problèmes posés par l'évolution du droit musulman et des solutions qui y ont été apportées.

D'ailleurs et dès aujourd'hui, pour celui qui veut se renseigner sur telle question touchant une institution du droit musulman en Afrique Anglaise, il y a quelque chose qui remplace ces vues générales, au moins dans une certaine mesure: c'est l'index, très bien fait, comme le sont en général les index des ouvrages en langue anglaise. C'est en examinant cet index qu'entre autres, notre attention a été attirée sur le petit point suivant: le Pr. Anderson a étudié les cas d'application du *li'ân*, du *zihâi* et de *l'ila*. Or le grand Ghazâlî (mort en 1111) déclarait déjà qu'il s'agit d'institutions disparues depuis longtemps,—et cela est vrai dans le sens sociologique du mot. Mais, quand on regarde de très près, comme nous l'avons fait jadis nous-mêmes, on s'aperçoit, qu'il en subsiste des traces infimes (sauf peut-être pour *l'ila*). Le Pr. Anderson est ainsi, dans son enquête, arrivé au même résultat que nous. Il a donc cru devoir poser des questions sur de minces particularités casuistiques de la Loi musulmane; cela témoigne d'un souci du détail très louable, car l'immense majorité des musulmans ne connaissent pas même les noms de ces trois institutions.

Si tel est l'intérêt que présente cet ouvrage pour l'islamologie, il en a aussi pour les spécialistes du droit colonial anglais. Nous désirons indiquer que ceux-ci n'ont pas à craindre d'être en présence d'un ouvrage qui leur soit inaccessible en raison des matières dont il traite, en sorte que seuls des spécialistes du Droit musulman pourraient l'utiliser avec fruit. En effet, nous voulons faire allusion au Glossaire qui se trouve à la fin de l'ouvrage et où les termes techniques sont exposés avec clarté et, pourtant, avec une grande précision technique.

Il est donc permis de recommander chaudement ce livre qui rendra des services d'un double point de vue.

G. H. BOUSQUET.*

* Pr. de Sociologie Nord-Africaine à la Faculté de Droit d'Alger.

Cases on the Law of Torts. By CECIL A. WRIGHT Q.C., Dean,
School of Law, University of Toronto. [Toronto: Butterworth
& Co. (Canada), Ltd. 1954. xix and 889 and (index) 15 pp.
50s. net.]

IN his preface Dr. Wright set out the objectives of this new case book prepared primarily for use in Canadian Law Schools as follows. "First to provide material that would not only raise most of the important problems of tortious liability but which could also serve as a basis for the study of the judicial process. Second, to find some means which would, at the same time, demonstrate that principles in the law of torts were not as simple as they seemed when embalmed in a textbook, and, in any event, provided no inevitable answers, and that questions of proof and choice of starting points were of equal, if not greater, importance in both the study and practice of law." It is thus a case book designed for use in a case book method of teaching law—the selected materials to be before the class to raise principles for extraction and discussion, a planned grouping of cases for oral presentation of differences and difficulties in the law and the judicial process under the guidance of a master learned in the law. It is not intended as a collection of cases selected only for their intrinsic authority—"Cases have been chosen, whether they be English, Canadian, Australian or American, which raise either a problem of fact which should challenge inquiry as to the method adopted by the court before which it came for solution, or a method of dealing with a familiar problem which casts light on or raises doubts concerning methods which through repetition have become "accepted" although not necessarily definitive." The cases are grouped into thirteen major chapter headings on a plan which starts with three chapters (pp. 11–110) on "intentional" invasions of the persons and interference with property and chattels, and the defences to actions for intentional interference with person or property, then a major and dominating chapter (Chapter IV, pp. 111–427) on Negligence, and remaining chapters under traditional headings. Each grouping of cases has a short and often provocative introduction designed to put the questions for consideration, and is in no sense a statement of "black letter text book law." This statement of the law will presumably be given by the lecturer in the context of the cases discussed by the class. The major cases are followed by extracts from cases from all the common law jurisdictions together with references to articles and works of authority. Finally there are posed questions for the students to consider. The whole presentation of the materials shows a life-time and world-wide breadth of knowledge of the common law and in its result gives us a major work based on experience and teaching. It may well influence English academics to broaden their common

law knowledge, and to experiment with case books on this excellent model.

The very excellence of the book for the purposes for which it is designed has, however, its own dangers. For the student here, it is a book for a good class man and graduate student—an excellent training in approach and handling of common law material and the judicial process. For the practitioner it is an excellent book to refer to for “starting points” both on old problems in a new setting, and for consideration of problems not yet considered in our courts. As a case book for students the reviewer would have liked to see a greater separation of the cases by helpful sub-headings in the body of the book, and consideration of general principles of liability and general defences under separate headings (*e.g.*, remoteness of damage). It is, however, only fair to say that these principles and defences are covered by the cases and discussions throughout the book and causation and remoteness are dealt with in Sec. 7 of the Negligence chapter. For the student moreover there is an excellent introductory chapter (pp. 1–10) placing “fault” or “no fault,” “general theory” versus “pigeon hole theory,” defences (privilege), in perspective in “the judicial treatment of loss distribution.” It includes also an admirable discussion of the necessity of analysing commonly used expressions or labels illustrated by “nuisance,” and a practical warning and discussion in relation to the terms “rights” and “wrongs,” “lawful” and “unlawful” acts. “Too much emphasis cannot be placed on knowing exactly what is implied in the use of such words whether it be by a court, a text-writer or, most important of all, a law student.” “The best we can do is to infuse them with some meaning and to try and find their proper limits, so that in the course of time, as opposing counsel discuss a problem in torts, such phrases will not be tossed about as self explanatory.”

To the English reader it is a book packed with material for study and is the jurisprudence of the law in action rather than statements of legal principle divorced from their case context. It is an invaluable work to take its place alongside rather than in place of Salmond and Winfield in the equipment of all students of the common law.

A. LL. ARMITAGE.

Clerk & Lindsell on Torts. Eleventh Edition. By A. L. ARMITAGE, M.A., LL.B., G. ELLENBOGEN, M.A., HIS HONOUR JUDGE CHARLES-WORTH, LL.D., T. A. BLANCO WHITE, B.A. [London: Sweet & Maxwell, Ltd. 1954. clvi and 1019 pp. and (index) 77 pp. £4 15s. net.]

THE new Clerk & Lindsell is a successor worthy of its predecessors and will on the whole satisfy the most exacting critics. There is a high degree of accuracy and clarity and the cases are generally

carefully chosen. The omission of cases is a matter on which opinions differ. The learned reviewer in the *Modern Law Review* (July, 1955, at p. 424) has drawn attention to some of the more important of these.

For the handling of the material there can be nothing but praise. The following comments are devoted mainly to points of principle and policy and are offered in the hope that they may be of service in perfecting an already excellent work. To begin with we note that the book has been prepared by four editors, who are each responsible for certain chapters. This has certain disadvantages. For one thing, the style changes, which may not matter in a work which is meant to be consulted rather than read from cover to cover and, in any case, uniformity of style in a work of this size may well be irksome. Still, changes in tricks of phraseology are occasionally disconcerting. "It is apprehended" is dominant in the first 200 pages or so and thereafter it fights a losing battle with "it is thought," "submitted," etc. "Strict liability" is favoured at pp. 36 *et seq.*, but in Chapter 18 (especially p. 616, n. (a)) this phrase is rejected in favour of "absolute liability." The citation of periodicals and foreign cases is also not uniform. There are, however, more serious matters. At p. 178 *Bourhill v. Young* is accepted with approval, but roundly denounced at pp. 348-9. At pp. 31, n. (a) and 177 it is pointed out with reference to *Hambrook v. Stokes* that breach of duty to the plaintiff was admitted on the pleadings and, indeed, on p. 31 we are referred to pp. 348-52. Yet at p. 349 where the point is vital in the context of the duty of care, there is no hint of it. The significance of it has been judicially recognised and ought not to have been excluded: (Atkin L.J. in [1925] 1 K.B. at 152, 156, *McNair J.* in *King v. Phillips* [1952] 2 All E.R. at 461-2, *Hodson L.J.* on appeal in [1953] 1 Q.B. at 443-4). Finally, the treatment of the subject-matter is uneven. Some chapters contain not only the law but also luminous discussion of principle, others are simply a statement of rules and statutory provisions. There is, for instance, a noticeable contrast between Chapters 1 and 2. No doubt, this is sometimes due to the subject-matter, but greater elaboration would have been welcome on Damages, Death and Remoteness.

Apart from these blemishes in presentation, there are matters of substance which call for comment. Chapter 1, laying the foundation of general principles, is all-important. The point of departure on p. 1 is Winfield's definition of "tortious liability" (not "tort"). We only suggest the addition of a gloss to emphasise the distinction between the "duty primarily fixed by the law," which is *in rem*, and the duty to pay damages, which is *in personam*. At pp. 10-23 we are told that it is not helpful to say that a tort is the infringement of a "right." This may well be so if "right" is understood in a vague and general sense (*e.g.*, pp. 11 and 19),

but not, as submitted elsewhere in this journal, if "right" is approached through "duty" and is conditioned by the recognition by law of the kind of harm sustained, the manner of its infliction and the class of person harmed.

Passing to the Elements of Tortious Liability (s. 6), the treatment of "act" leaves something to be desired. ("Act" is not in the index, although "omission" is.) Does "act" mean conduct alone, or conduct in relation to circumstances, or conduct plus a given consequence? There is no explanation although these fluctuations in meaning are important. We are told also that an act must be "voluntary," but no explanation is forthcoming as to what this means. "Voluntary" generally means that the bodily movements are controlled by the mind (*Gilbert v. Stone* (1647) Aleyn 35, *Smith v. Stone* (1647) Style 65, *Gibbons v. Pepper* (1695) 2 Salk. 637). The lack of explanation at this initial point causes confusion later, e.g., at p. 427, para. 694. At p. 36 the mental element is discussed. We are faced with a disquieting statement: "The distinction between negligence and intention cannot really be maintained, because liability in negligence may be based on an intentional act, such as driving a car on the wrong side of the highway; a collision is not of itself unlawful, it is unlawful because it was caused by the intentional, but wrongful, act of the driver being on his wrong side." Surely, intention and negligence relate to consequences of conduct according as they are adverted to and desired, or not adverted to when a reasonable man would have done so. An act may be intended, but negligent as to some of its consequences just as it could be intentional as to those consequences. Suppose a man not only intended to drive on his wrong side, but also to run over X. His liability is hardly in negligence: it will be for battery at least if worse has not already befallen him in the criminal courts. The whole of the Mental Element section, especially Intention (p. 42) suffers from the absence of clear analysis of intention, recklessness and negligence. Also, the question what kind of act constitutes battery (pp. 263-4) would be clearer if the distinction is drawn in terms of the one kind of mental element necessary for a voluntary act and the different kind needed for intended consequences.

We also venture to register some doubt about Inevitable Accident. The statement that "There is no room for the doctrine of inevitable accident where the liability involves negligence, since the duty of care implies that the defendant shall only be responsible to take the care of a reasonable and prudent man" (p. 35) is misleading. Is it not true that inevitable accident applies only where liability rests on negligence in the sense that inevitable accident=absence of carelessness on the defendant's part? Where liability is strict, i.e., does not rest on intention or negligence, inevitable accident is no defence. (In connection with *Stanley v. Powell*, it is noteworthy that the Exchequer report of *Holmes v.*

Mather is quoted at pp. 51-2. It might be of interest to have more than a footnote reference to the somewhat different version in 33 L.T. 361 and Mr. Landon's comments in *Pollock on Torts*.)

After the stimulating challenge of Chapter 1, the following chapter on Parties is simply an accurate enumeration of rules. Apart from the section on Assignees, there is little discussion, the absence of which is felt in the sections on Corporations and Unincorporated Associations (ss. 11 and 12). One feels sympathy for the editor when we come to Master and Servant. A very difficult task has been performed perhaps as well as it could be. The question who is a servant (pp. 116-7) seems to have been dealt with rather too lightly in the face of the bulk of troublesome and barely reconcilable cases. The section on independent contractors is good.

The topic of Damage and Damages is the least satisfactory of all. In the first place, although there is a chapter on Damage, the detailed treatment of it is scattered throughout the book under Trespass to the Person, Negligence, Trespass to Chattels, Trespass to Land, Defamation, Malicious Prosecution. To some extent this is inevitable, yet one feels that the topic falls between the stools. To give an example, there is hardly anything in section 2 of Chapter 6, which deals with Measure of Damages, about the complexities of damages in the action for personal injuries, but there is a full account of damages under the Law Reform Act, 1934, in the chapter on Trespass to the Person, a further twenty-seven lines at the end of that chapter and a brief section under Negligence. Not only is there repetition of some points, but a lack of treatment of others, notably the Fatal Accidents Act, 1846.

In Chapter 6 itself the measure of damages is treated before remoteness. This is putting the cart before the horse. No man is liable to pay for all the consequences of his conduct. The first question is where we are to draw the line (remoteness) and then we concern ourselves with the estimation of the consequences included within the line (measure of damages). The section on Remoteness (s. 3) suffers through not facing all the cases and the failure to take into account the all-important point that damage to the plaintiff, no matter how slight, should have been reasonably foreseeable. In consequence, the explanation of *Re Polemis* (pp. 181-2) is misleading. The arbitrators in that case had found as a fact ("by whose findings we are bound," said Scrutton L.J.: see Finding (f) [1921] 3 K.B. 560, 563) that some slight damage to the ship could have been foreseen. On this basis it is submitted with respect that the criticism of *Sharp v. Powell* (p. 182) is beside the point and the same must be said of the discussion at pp. 185-6. Another point is that there is no mention anywhere of "parasitic damages": (*Horton v. Colwyn Bay* [1908] 1 K.B. 341; *Lampert v. Eastern National Omnibus Co.* [1954] 1 W.L.R. 1047). Perhaps, *Huxley v. Berg* and *Cock*

v. *Wortham* (pp. 168-9) are explicable on this ground. At p. 172 the decision in *Liesbosch Dredger v. Edison* is accurately summarised, but nothing is said of the relation between this case and *Re Polemis*. Had remoteness been dealt with before measure of damages, the importance of this point might have suggested itself. It is also a trifle odd to find nervous shock dealt with under Damages (p. 176).

In the vigorous chapter on Negligence, Dr. Charlesworth handles the substance of the law competently. There is nevertheless room for criticism. In our opinion the gravest omission is the absence of a clear explanation of what is meant by "breach of duty" in negligence and the part played by the reasonable foreseeability of harm to the plaintiff. The requirement of foreseeability is beyond cavil, but does it pertain to "duty of care," "breach" or "remoteness"? Much confusion and misunderstanding exist owing to the failure to face this point. Apart from this, the first three sections may well stir academic lawyers into action and cause practising members of the profession some concern. The latter may look askance at the assertion on p. 349 that *Bourhill's* case was wrongly decided. The reasonable foreseeability of harm to the plaintiff is indispensable, as already stated, call it what you will and place it where you will, whether under "duty," "breach" or "remoteness." The root of the trouble seems to be that in *Bourhill's* case the House of Lords clothed the foreseeability test with the phrase "duty of care." In substance all they decided was that no harm of any kind to the plaintiff was reasonably foreseeable. This is a question of fact, as is admitted at pp. 352 and 368, and the condemnation of a case as wrongly decided on an interpretation of fact is more than questionable. It is suggested with respect that Dr. Charlesworth's quarrel is with classification and terminology rather than with substance. *Glasgow Corp. v. Muir* (p. 356), where the defendant was held not liable because harm to the plaintiff could not have been foreseen, provokes no criticism, presumably because here the House of Lords placed the foreseeability test under "breach." What needs criticism is not case-law, but the mess surrounding the phrases "duty of care" and "breach of duty." At p. 350 it is said that *Owens v. Liverpool Corp.* "was not, and could not be, overruled by *Bourhill v. Young*," because the latter was an appeal from Scotland. This seems a little dogmatic in view of the peculiar position enjoyed by the House of Lords in relation to English and Scots law.

These are the major points. The rest of the book maintains its high standard to the end, except for occasional minor matters. The treatment of licenses at pp. 538 *et seq.*, if an invidious distinction be permitted, bears no comparison with the treatment of it in the current edition of Winfield. At pp. 35 and 575 it is stated that a nuisance may be committed without negligence, yet

at p. 570 the absence of negligence is said to be a defence. In Chapter 18, with its quaint title, "Dangerous Property, Premises and Things," section 2 on Dangerous Chattels is not adequate. It covers three and a half pages and there is no mention of *Donoghue v. Stevenson* in the text. Under Dangerous Premises the discussion of "unusual danger" in n. (k) on p. 675 and the sentence in the text to which it is appended is confusing. In connection with the explanation of "actual knowledge" of a trap (p. 684), the name of Asquith L.J., who formulated the test quoted in the text, might be included, if not in the text at least in the note. The question how far the duties in regard to dangerous premises relate to property damage deserves some attention: (see dicta in *Tinsley v. Dudley* [1951] 2 K.B. 18). In Chapters 19 and 20 the book reaches its peak; they are very good indeed. No doubt, the time-worn proposition that statements of present intention are statements of fact (p. 696) will have to be reconsidered in the light of *R. v. Dent* [1955] 3 W.L.R. 297. At pp. 852-3 we are told how important it is for the purpose of malicious prosecution to know what is a criminal charge, yet the treatment of it and the distinction between civil and criminal remedies is unsatisfying. At p. 863, where reasonable and probable cause for instituting a prosecution is under discussion, the effect of a conviction later quashed on appeal is not adequately faced. In Chapters 25, 26 and 27 the law relating to copyrights, patents and trade marks is dealt with clearly and with an assured touch.

In conclusion, attention is drawn to a few minor points. Is a constable "prima facie a servant of the Crown"? (p. 271 n. (u)). Mr. Justice Holmes is too great a figure to have his dignity diminished by the addition of "jun." after his name (p. 468), while it is unnecessary to add to the stature of Coke and Holt by conferring peerages on them: (Holt is "Lord" at p. 850 and "C.J." at 891). "Lord Simonds C." also reads queerly (p. 576). In view of the vagaries of possession in different branches of the law, there seems hardly any point in perpetuating the misleading cliché that "what amounts to possession is a question of fact in each case" (p. 521).

Editing other people's books is generally a thankless task, but every lawyer will stand indebted to the present editors for the way in which they have discharged their duty in presenting anew this important work.

R. W. M. DIAS.

Theobald on Wills. Eleventh Edition. By J. H. C. MORRIS, D.C.L., of Gray's Inn, Barrister, Fellow of Magdalen College, Oxford. [London: Stevens & Sons, Ltd. 1954. xxxvi and 720 and (index) 39 pp. 75s. net.]

THE new edition of *Theobald* is improved in layout and printing and, although longer, maintains its reputation for condensed and

scholarly statement of the law. It is a happy mean with the much longer Jarman on one side of it and the brief but ever classical Hawkins on the other.

Dr. Morris has continued his task of revising the work *au fond*, with great profit to the profession and to the reputation of the book. The law is brought up to the end of November, 1953. That it is still chaotic where it relates to conditions is no fault of the learned editor. As Lord Radcliffe said in *Leong v. Lim Beng Chye* concerning conditions subsequent in partial restraint of marriage annexed to a bequest of personalty and their ineffectiveness in the absence of an explicit gift over, "One thing is certain about this rule [that the condition subsequent is merely *in terrorem* in such a case]: it exists."

The Editor, it might be argued, can likewise only take the law as he finds it. But in fact Dr. Morris has done a great deal to elucidate it and he has certainly shown courage in expressing his own views—even on the true limits of the doctrine of equivocation.

The law of partial intestacy will deserve fuller treatment hereafter in the light of section 3 of the Intestates' Estates Act, 1952.

The chapters on Conflict, Family Provision, Soldiers, Secret Trusts and Perpetuity have been thoroughly and ably rewritten. Duties and Taxes are carried to a separate chapter but in such brief form that recourse to larger specialised works will be essential.

This edition is thoroughly to be commended.

HENRY SALT.

The Solicitors' Guide to Development and Planning. Second Edition. By R. N. D. HAMILTON, LL.B., Senior Assistant Solicitor, Buckinghamshire County Council. [London: The Solicitors' Law Stationery Society, Ltd. 1955. xv and 181 and (index) 11pp. 22s. 6d.]

THE lot of practitioners whose duty it is to keep up to date with the complexities of modern legislation is not a happy one. This book, the first edition of which was published in the Oyez Practice Notes series, is written for the benefit of the busy solicitor, who may have little time to devote to the study of the Town and Country Planning Acts, 1947 to 1954, but who must still be prepared to give advice and to take action under these Acts, which may be of vital importance to his clients. It is designed, we are told, "primarily for affording guidance to solicitors advising clients interested in land on those practical points which must arise from day to day in their offices." Emphasis is therefore laid not so much on the provisions of the Acts and of the numerous Regulations made thereunder as on the more common planning problems with which solicitors are likely to be confronted. The attention of the reader is called to the various situations which are likely to

be laid before him: and he is told, often in considerable detail, not only what to do, but also in many cases how to do it.

The first half of the book, after two introductory chapters in which the salient features of the Acts as a whole are set out and an account given of the different administrative authorities and their functions, deals with Development Plans (Chapter III) and Control of Development (Chapters IV to XI) under the Act of 1947. The more important provisions of the Act and of the relevant regulations are clearly explained. In particular there is an exceptionally lucid account of the various documents which make up a Development Plan and their relation to each other (pp. 12 to 24). But the author is mainly concerned, first with helping his readers to decide whether any, and if so what, action is necessary in particular sets of circumstances: and secondly with guiding them through the procedure to be adopted when once a decision has been taken. In Chapter VII, for example, the reader is first given seven tests to apply to an enforcement notice in order to determine whether the notice is valid: and then, in tabular form, the different methods of challenging a notice which is believed not to have passed any one or more of those tests. A full account is given of the procedure at planning inquiries (pp. 24-6, 46-9) together with a critical discussion (in view of "public inquiry" on the subject) of the methods whereby questions raised at such inquiries are decided (pp. 49-55). Finally Chapter XI, which did not appear in the first edition, discusses the extent to which the aid of the local planning authority can be invoked as an alternative to bringing an action for nuisance.

The second half is mainly concerned with the rights of a landowner to claim compensation under the Acts of 1947 and 1954 (Chapters XII to XV): but there is also an account of the provisions of the Acts which relate to the compulsory acquisition of land (Chapter XVI) and finally a chapter on conveyancing practice. Here again the approach is the same. After a brief historical outline of the compensation provisions the author writes (p. 104): "The reader will, however, not be interested so much in a list of the various rights as in a list of the various cases which are likely to be brought into his office by clients wanting to claim compensation, with a reference to the particular rights which he ought to consider in relation to each kind of case," and then there follows a table in which are set out on the left a list of fifteen likely situations and on the right the possible claims to compensation in each case together with page references to the passages in the text where these claims are fully and clearly explained. In the chapter on conveyancing practice also stress is laid on the practical points which ought to be borne in mind by a solicitor when acting for a client on a sale, lease or mortgage of land. The planning clauses contained in the National Conditions of Sale and the Law Society's Conditions of Sale are compared: and the

reader is also told at great length how to safeguard his client against possible trouble with the planning authorities (pp. 162-75).

This is not an exhaustive treatise on the Town and Country Planning Acts. Other works have appeared in which the Acts of 1947 and 1954 are analysed section by section, and they are by no means superseded. This book, however, should be found very useful by practitioners as an aid to the solution of their planning problems. It might also be read with profit by articleed clerks and others who wish to obtain some knowledge of planning law as a whole without risk of becoming lost in a mass of detail.

D. MACINTYRE.

Treatises on the Baltcon-Charterparty. By KJELD RØRDAM, Barrister of the Supreme Court of Denmark. [Copenhagen: G. E. C. Gad, and London: George Allen & Unwin, Ltd. 1954. 196. pp. 32s.]

THIS book by a Danish lawyer provides the reader with a most thorough analysis of the Baltcon Charterparty. This is a standard form dating in its original shape from 1908, and used extensively in the coal export trade from U.K. ports to Baltic ports. In the course of time it has been amended and its scope widened to meet modern requirements.

The method chosen by the author to present his comments is by way of annotations and copious footnotes. The clauses of the printed form are presented to the reader in groups selected according to logical continuity: preliminary arrangements between the parties, loading, voyage, discharge, and possible disputes. The case law is that formulated by the courts of Denmark, Sweden, Norway and Finland, and references are made to the statutory provisions in force in those countries.

It is interesting to note that the treatment of these commercial matters in the Scandinavian courts is very much on the same lines as in the English courts. This is not, however, very surprising, as industrial trade relations require a good deal of essential similarity in the interpretation of international contracts. Indeed, the tendency has of late been deliberately to foster such similarity. Quite recently, for instance, Denning L.J. remarked: "In matters of this kind, however, it is very important that the countries of the world should have the same rule. I find that most European countries have substantially the same rule as that I have stated." (*Entores, Ltd. v. Miles Far East Corporation* [1955] 3 W.L.R. 48, at p. 52.)

There is considerable value in this book not only for those engaged in shipping and shipping law, but also from the wider aspect of comparative law. And beyond that, as a good many of the annotated clauses of the standard Baltcon Charterparty are to be found in similar Forms relating to the coal and other

trades in every part of the world, the Scandinavian courts' interpretations may be analogously applied to many problems arising out of maritime contracts outside the Anglo-Scandinavian fuel trade. The author includes cross-references to the Polcon Charterparty (coal and coke trade with Poland), and there are innumerable other similar standard agreements, such as the Dancon Charterparty, the Welsh Coal Charter Form of the Chamber of Shipping, etc., which whenever Scandinavian ports are involved might render the author's case law compilation most valuable.

There are a few doubtful comments as well as one or two which may appear perhaps a little obvious to the professional reader in this country or the U.S.A. It is, for instance, not a matter of course that loading time, for all purposes, cannot commence to count before the definite loading date (p. 45): cf. *Societa Ligure di Armamenti v. Joint Danube and Black Sea Shipping Agencies of Braila* (1931) 47 T.L.R. 296, where in a matter concerning a Dancon Charterparty, waiting time and loading time were added together to compute demurrage.

Comments such as that it is not unusual "for deviation to be made for calling at bunkering port during the voyage" (p. 95), or that the weight of deck cargo may increase due to rain or seawater, whereby the owner does not become entitled to additional freight (p. 164), are possibly unnecessary in a specialised book of this nature. It might also have been preferable to put all the case law in the footnotes, rather than to distribute it throughout text and footnotes in a somewhat arbitrary fashion.

Having said that, there is much to be praised. The *force majeure* observations are completely to the point, especially concerning the effects of nationalisation in the fuel industry; there are some genuinely practical comments on methods of discharge (not specified in the Balcon form) and the disputes procedure is briefly but correctly set out. (The English Act referred to on pp. 174 *et seq.* should be referred to as the Arbitration Act, 1950.

As a study of the Balcon form with reference to the interpretation of charterparty forms generally, and as a compilation of interesting case law, this book is not only very readable but likely to be of considerably wider use than one would expect from a specialised study. Many commercially or legally interested readers are likely to derive a good deal of benefit from Mr. Rørdam's carefully written book, and that being the case, this Danish contribution to commercial legal literature must be warmly welcomed.

Two suggestions for use in future editions:

- (i) A specimen Balcon Form, as an Appendix, and
- (ii) Some indication of the Scandinavian courts' attitude to the contention that in a charterparty more weight must be given to the written rather than the printed terms, as expressed in this country in *Scrutton v. Childs* (1877) 36 L.T. 212.

DEREK H. HENE.

International Law of the Sea. Third Revised Edition. By C. J. COLOMBOS. [London: Longmans Green & Co., Ltd. 1954. xvi, 695 and (index) 23 pp. 50s.]

ALMOST all the material additions incorporated for the first time in this revised edition of what must now be regarded as the standard book on the subject in the "Anglo-Saxon" world, are to be found in Part I, the "Peace" section of the book.

The recommendations of the International Law Commission, incorporated in their various reports until 1953, are liberally interspersed throughout the relevant chapters. The Bahamas Petroleum Act, the Anglo-Norwegian Fisheries case, and references to the Brussels Convention of 1952 on concurrent criminal jurisdiction in collisions, and the Canada-United States Whaling Agreement of 1949 are now included for the first time.

There is also some additional national case law—such as the *Truculent* collision—although this revised edition was apparently prepared before the new International Collision Regulations became law.

This work has further been brought up to date by the inclusion of references to such matters as weather patrol ships, and the 1954 revision of the North Atlantic Agreement relating thereto, the Commonwealth Shipping Committee and the plans for a Permanent International Sea Commission on the basis of the Inter-Governmental Maritime Consultative Organisation. On the subject of oil pollution one might have expected, under para. 362, some reference to the recent *Southport* case.

Apart from a short reference to the Geneva Convention of 1949, dealing with treatment of the wounded, hospital ships and the use of aircraft for medical transport purposes, the "War" section of the book does not differ essentially from the second edition.

Generally speaking, the reader, especially anyone concerned with the routine work of daily public life, cannot easily overlook the chasm between the theory of International law as so carefully analysed in this most comprehensive book, and the reality of the true relationship between members of the comity of nations at the present time. This problem becomes most brutally apparent on reading the short paragraphs on pages 354-5 dealing with sanctions in time of peace, and comparing these methods with the elaborate system of bellicose procedure in Part II of the book.

The determination of the United Kingdom in the twentieth century to uphold legal principles in the face of very great odds and notwithstanding the deprecatory attitude of so many States stands out quite clearly. To an unbiased reader—if there be such—proof of this uncompromisingly "legal" attitude by successive Governments in the United Kingdom may well be one of the most significant, although perhaps not actually intended effects of this book.

The publishers indicate that certain further translations of the book into foreign languages are in preparation; perhaps it is not too much to hope that these factual conclusions to be drawn from the over-all picture of differing national attitudes to international legal conceptions appertaining to the sea, will make a genuine impression on some of the new readers in the countries concerned, perhaps with some practical results.

It is almost superfluous to add that while this book will undoubtedly be a most useful addition to the library of anyone interested and concerned with international law in any respect, it will most particularly appeal to sailors as well as shipping lawyers all over the world, for many of whom it is likely to become essential reading matter.

DEREK H. HENE.

The Meaning of Income in the Law of Income Tax. By F. E. LABRIE, Associate Professor in the School of Law, University of Toronto. [Toronto: University of Toronto Press (London: Geoffrey Cumberlege). 1953. xi and 367 and (index) 12 pp. 97s. 6d. net.]

DOMINION income tax legislation brings into greater prominence the fundamental question of all income tax law: "What is 'income'?" In Canada the tax is imposed upon "the taxable income for each taxation year of every person" (the Income Tax Act (of Canada), s. 2 (1)). "Taxable income" is defined in the same section of this Act as the "income" of the taxpayer minus certain deductions based on personal status or providing relief from double taxation. The following section (s. 3) proceeds to define "income" in these enigmatic terms: "The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all (a) businesses, (b) property, and (c) offices and employment." The Act continues, the appetite thus whetted, with the more cryptic statement, "Income for a taxation year from a business or property is the profit therefrom for the year" (s. 4), and the more informative, "Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities received by the taxpayer in the year, plus (the value of board, lodging and other benefits and allowances with certain specified exceptions) minus (certain specified deductions)" (s. 5). No further attempt is made in the statute to elucidate the basic meaning of "income" or "profit."

In the corresponding United Kingdom Act (Income Tax Act, 1952), the approach is less straightforward, the tax being imposed upon the subject-matter described in the various Schedules. These charge tax, each Schedule in respect of a particular kind, or

particular kinds, of source of income, upon "the annual value" (Schedule A), "the assessable value" (Schedule B), "the profits" (Schedule C), "the annual profits or gains" (Schedule D), "all interest of money, annuities and other annual profits or gains" (Schedule D), and "all salaries, fees, wages, perquisites or profits whatsoever" (Schedule E). This structure led at one time to a widely held supposition, now regarded as heretical, that the tax was not a pure income tax but a collection of different taxes, that under Schedule A for instance being in the nature of a property tax, and thence to the often quoted remark of Lord Macnaghten, "Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else." (*L. C. C. v. Att.-Gen.* [1901] A.C. 26 at p. 35.) Despite the importance of that fundamental principle, the meaning of "income" or the synonymous term "profits or gains" is seldom singled out for undivided attention in English writings, as it is in the Dominions.

Professor LaBrie's book is a remarkable contribution to the study of this problem. It is not of course a work merely of value to the Canadian lawyer. A glance at the index will reveal that the majority of the cases referred to in the book are those of United Kingdom courts. Moreover the identity in substance of the relevant United Kingdom and Canadian provisions is reflected in the Canadian cases included, the judgments in which are frequently based on United Kingdom decisions, even where there are material differences between the statutes of the two countries, *e.g.*, in determining whether the gain made by an isolated purchase and resale is taxable, the test of whether the transaction amounts to trading seems to have been adopted in Canada although dictated here by the schedular division of the United Kingdom tax. Professor LaBrie has further chosen to treat his subject as a study equally of United Kingdom law as of Canadian, and where the differences in the statutory provisions cause material divergences in the two systems of law, equal space is given in the book to a consideration of the law of the United Kingdom as to that of Canada.

Part I (52 pages) explains the relevant provisions of the Canadian and United Kingdom legislation. It is perhaps unfortunate that since the book was written the United Kingdom enactments have been consolidated in the Income Tax Act, 1952, but the older statutory provisions quoted have been re-enacted without material alteration in the new Act. Part II is devoted to a study of the meaning of gross income, under three heads "Income from Business," "Income from Property" and "Income from Personal Services." Part III is concerned with expenditure which may be deducted in ascertaining net income, and again has three headings, the first primarily containing a review of the relevant statutory provisions of each country, the second dealing with the United Kingdom decisions, and the third with the Canadian. The Canadian decisions are here not of such value in

illuminating the United Kingdom law, since the Canadian statutes have always contained provisions disallowing expenditure that are different from and *prima facie* more restrictive than those contained in the United Kingdom statutes. Professor LaBrie considers that these particular statutory provisions of the two countries are not in essence much different, but this view has not been generally followed by the Canadian courts. Admittedly the Canadian enactments contain provisions strikingly similar to the United Kingdom Act's prohibition of deductions in respect of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade" (s. 137 (a)) when that is read with Lord Davey's famous gloss that the disbursements must accordingly be made "for the purpose of earning the profits" (*Strong v. Woodifield* [1906] A.C. 448 at p. 453); but it has now been indicated by the House of Lords in *Morgan v. Tate & Lyle, Ltd.* [1955] A.C. 21, that the more accurate statement of Lord Davey's views is that found a little earlier at [1906] A.C. p. 453, namely, "These words . . . mean for the purpose of enabling a person to carry on and earn profits in the trade." It is a pity that this recent decision came after the publication of the book, as it would no doubt have provided valuable material for the author, and in many ways supports his arguments in discussing the Canadian phrase "for the purpose of earning the income."

The author has not attempted to review every United Kingdom decision bearing upon this subject, but has selected those which he considers most important. These are examined from a detached viewpoint and the principles established by them demonstrated and tested. The result is a brilliant critical study of the main features of income tax law, looked at with notable breadth of vision and keenness of insight, and containing constructive criticisms of the law as at present authoritatively declared which are exceedingly interesting and stimulating. Most readers will no doubt wish that other difficulties in the law had also been pointedly illuminated by the same hand. The author's comments upon the decisions in regard to clubs would be a valuable supplement to those on mutual insurance and co-operative societies contained in the book, and it would be very helpful to have his views on *Dott v. Brown* [1936] 1 All E.R. 543, in addition to the decisions mentioned upon the conversion of capital into income.

P. W. E. TAYLOR.

The Elements of Income Tax Law. Second Edition. By C. N. BEATTIE, LL.B., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1953. xxxii and 199 and (index) 9 pp. 25s. net.]

SINCE the first edition of this admirable introduction to the law of income tax was published in 1951, the statutes with which it

is concerned have been consolidated in the Income Tax Act, 1952, and this edition is based upon that Act. The book is primarily intended for the student, who will be little concerned with tax for years prior to April 6, 1952, and references to the repealed enactments have accordingly been entirely omitted and replaced by those to the new Act. This edition also incorporates the effect of the relevant provisions of the Finance Act, 1952, and contains in a supplement a note of the changes foreshadowed in the 1953 budget.

The book is intended for the law student, not for the future accountant, and its emphasis is therefore on those matters of income tax law which are most frequently encountered by practising lawyers. The problems which arise in taxing a commercial undertaking are only lightly sketched. Thus the profits of trades and professions are dealt with in only twenty-eight pages, whereas as many as twenty-one pages are devoted to income arising under wills, intestacies and settlements. Nevertheless the author's talent for selecting, and expressing in clear yet concise language, the essential material has ensured that in the chapter on trades and professions there is to be found a lucid, informative and practical account of this subject which should well meet the needs of those for whom the book is designed.

The problems arising under settlements or in the administration of estates are admirably treated, and the content of the evasion provisions affecting settlements and other dispositions of income and assets is noted. There is a chapter devoted to questions of residence and domicile and tax upon income arising abroad.

The author has sought to avoid an approach which would merely state the general practical result of the law. As he mentions in the preface to the first edition such an approach is apt "to obscure the underlying legal principles, and practice comes to be regarded as law." His aim is "to deal primarily with law, thus revealing the foundation on which the practice should be based." This objective is not easy to achieve in a small but relatively comprehensive textbook, and there are passages where a statement of the "satisfactory working rule" has perforce had to supplant a longer statement or discussion of the law. It would for instance have been interesting to have the author's analysis of the decisions bearing upon whether section 169 or section 170 of the 1952 Act applies to an annual payment. These decisions are merely stated to be conflicting and the true position in doubt, but it is not easy to see how any court could refuse to follow the principles enunciated in *Allchin v. Coulthard* [1943] A. C. 607, upon this point. Also it might perhaps be doubted whether it is wise to telescope the law and the extra-statutory concession on this question, as seems to have been done at page 21, since the concession cannot affect the law as between payer and payee determining the rate at which deduction of tax is to be made, and the passage dealing with

payment of capitalised interest at page 23, which is presumably stating a similar telescoped rule, is not easy to follow.

Another passage in which working rules seem to have unhappily replaced fundamental law is in the list of the six Cases of Schedule D at page 10, where Cases I and II are said to include the profits of trades and professions carried on abroad by persons resident in the United Kingdom. It is not mentioned here that this is the rough effect of the law, and the reader may accordingly be surprised to find the conflicting statement at page 62 which is in more orthodox terms excluding from these Cases trades etc., carried on wholly abroad, and may be relieved to reach page 170 where it is explained that any trade controlled from the United Kingdom is necessarily carried on in the United Kingdom, and that a United Kingdom resident carrying on a trade anywhere will therefore normally be assessed under Case I. Many students might after reading this generalisation be puzzled to meet *Mitchell v. Egyptian Hotels Ltd.* [1915] A.C. 1022, and perhaps it might be helpful if there were some mention of the exceptional case of a person with two countries of residence controlling a trade from one, and a footnote referring to this decision.

The taxation of "excess rents" is a long and complicated topic to explain fully, and the author has simplified it by dealing in effect only with cases of the letting of complete units of assessment, mentioning in a footnote that property subject to separate tenancies or occupations is governed by special rules. Once the letting of flats and other such cases is excluded from discussion in this way, it ought to be possible to state more simply than is done at page 55 the mode of division of short leases into two groups for purposes of excess rents assessments, and perhaps this could be considered in future editions. In the first example on the following page (56) ought not the repairs allowance to be restricted to £10 in accordance with section 100 (1) (b) of the 1952 Act?

Although the text of the book is enlivened and illuminated with well-chosen illustrative cases, there are comparatively few numerical examples. This may be regarded as a merit by some, but there will be many readers who will regret the absence of such practical illustrations.

P. W. E. TAYLOR.

Books also received include the following:—

Alta Corte per la Regione Siciliana, 3 vols. [A. Giuffrè. 1954. N.P.]

BLAUSTEIN, A. P., and PORTER, C. O., *The American Lawyers*. [Cambridge University Press. 1954. 41s. 6d.]

Chitty's Mercantile Contracts. [Sweet & Maxwell, Ltd. 1955. 55s.]

COHN, G., *Existenzialismus und Rechtswissenschaft*. [Helbing & Lichtenhahn. 1955. N.P.]

- GOUGH, J. W., *Fundamental Law in English Constitutional History*. [Oxford University Press. 1955. 25s.]
- GARNER, J. F., *Road Charges*. (No. 37 Oyez Practice Notes) [The Solicitors' Law Stationery Society Ltd. 1955. 8s. 6d.]
- GRAY, H. R., *The Law of Civil Injuries*. [Hutchinson's University Library. 1955. 8s. 6d.]
- HEAP, D., *Town and Country Planning Act, 1954*. [Sweet & Maxwell, Ltd. 1955. 30s.]
- HARPER, J. C., *Profit Sharing in Practice and Law*. [Sweet & Maxwell, Ltd. 1955. 38s. 6d.]
- HAMSON, C. J., *The Law: Its Study and Comparison*. An inaugural lecture. [Cambridge University Press. 1955. 2s. 6d.]
- HOLDEN, J. M., *The History of Negotiable Instruments in English Law*. [The Athlone Press. 1955. 42s.]
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FOREWORD

1

CASE AND COMMENT

Judges in Colonial Territories Retirement of Clerk with Justices	7	Contribution between tortfeasors and limitation	50
Discovery in Crown Proceedings	11	Remunerated Trusteeship	55
Natural Justice in Administrative Law	14	Intention to give and Presumption of Advancement	57
Foreign Legislation contrary to International Law	20	Provisions tending to discourage use of Settled Land Act powers	60
<i>Bona vacantia</i> and <i>ultimus heres</i> in Private International Law	22	Capital money for repairs of agricultural settled land	63
Conspiracy and Public Mischief	26	Implied terms in and actions upon covenants not to assign or sublet	66
Condonation of military offences and power to dissolve courts-martial	30	Weekly tenancy and liability for repairs	71
Rectification and rescission for mistake	32	Deserted wife and matrimonial home	72
Contributory Negligence and Causation	36, 42	Money found in matrimonial home	73
Master's vicarious liability to servant's spouse	45	Uncertainty and condition precedent or qualification	76
Vicarious liability for tort of "Agent"	49		

PROFESSOR SIR PERCY WINFIELD *Sir Arnold McNair and P. A. Landon* 80

FURTUM AND LARCENY *Professor P. W. Duff* 86

THE EFFECT OF STATUTORY NOTICE OF INCUMBRANCES *H. W. R. Wade* 89

NOT DOING IS NO TRESPASS: A VIEW OF THE BOUNDARIES OF CASE *S. F. C. Milsom* 105

RES IPSA LOQUITUR: THE AUSTRALASIAN EXPERIENCE *D. P. O'Connell* 118

BOOK REVIEWS

BELL: Introduction to the History and Records of the Court of Wards and Liveries	133	JACKSON: Machinery of Justice in England	137
MANSENGH: Documents and speeches on British Commonwealth Affairs	135	SALMOND on Torts	142
		HALE: Freedom through Law	145
		Books Also Received	145

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